

**A. 2 (A)**

HIGHLY CONFIDENTIAL - S. BERKENFELD  
UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In Re:

Chapter 11

LEHMAN BROTHERS Case No. 08-13555 (JMP)  
HOLDINGS, INC., et al., (Jointly Administered)

Debtors.

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\* \* \*HIGHLY CONFIDENTIAL\* \* \*  
DEPOSITION OF STEVEN BERKENFELD  
New York, New York  
August 6, 2009

Reported by:

KATHY S. KLEPFER, RMR, RPR, CRR, CLR

JOB NO. 24035

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<p>1       HIGHLY CONFIDENTIAL - S. BERKENFELD 2             August 6, 2009 3             9:30 a.m. 4 5       HIGHLY CONFIDENTIAL deposition 6       of STEVEN BERKENFELD, held at Jones 7       Day, LLP, 222 East 41st Street, LLP, 8       New York, New York, before Kathy S. 9       Klepfer, a Registered Professional 10       Reporter, Registered Merit Reporter, 11       Certified Realtime Reporter, Certified 12       Livenote Reporter, and Notary Public 13       of the State of New York. 14 15 16 17 18 19 20 21 22 23 24 25  TSG Reporting - Worldwide (877) 702-9580</p>	<p>1       HIGHLY CONFIDENTIAL - S. BERKENFELD 2 3             A P P E A R A N C E S: 4 5       JONES DAY, LLP 6       Attorneys for Lehman Brothers, Inc. 7             222 East 41st Street 8             New York, New York 10017-6702 9       BY: ROBERT W. GAFFEY, ESQ. 10       BRIDGET CRAWFORD, ESQ. 11 12       BOIES, SCHILLER &amp; FLEXNER, LLP 13       Attorneys for Barclays Capital 14       and the Witness 15             575 Lexington Avenue - 7th Floor 16             New York, New York 10022 17       BY: JACK G. STERN, ESQ. 18 19 20 21 22 23 24 25  TSG Reporting - Worldwide (877) 702-9580</p>
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<p>1       HIGHLY CONFIDENTIAL - S. BERKENFELD 2       A P P E A R A N C E S: (Cont'd.) 3       QUINN, EMANUEL, URQUHART, OLIVER &amp; HEDGES, LLP 4       Attorneys for the Creditors Committee 5             865 S. Figueroa Street, 10th Floor 6             Los Angeles, California 90017 7       BY: ERICA P. TAGGART, ESQ. 8 9       JENNER &amp; BLOCK, LLC 10       Attorneys for the Examiner 11             330 N. Wabash Avenue 12             Chicago, Illinois 60611-7603 13       BY: ROBERT L. BYMAN, ESQ. 14 15       HUGHES, HUBBARD &amp; REED, LLP 16       Attorneys for the SIPA Trustee 17             One Battery Park Plaza 18             New York, New York 10004-1482 19       BY: NEIL J. OXFORD, ESQ. 20       AMINA HASSAN, ESQ. 21       JOHN F. WOOD, ESQ. 22 23       Also Present: 24       THOMAS E. HOMMEL, Lehman Brothers 25       PHILIP E. KRUSE, Alvarez &amp; Marsal  TSG Reporting - Worldwide (877) 702-9580</p>	<p>1       HIGHLY CONFIDENTIAL - S. BERKENFELD 2       (Witness sworn.) 3       MR. STERN: I should just state on the 4       record before we start that, in terms of 5       confidentiality, we on behalf of Barclays 6       will designate this transcript as highly 7       confidential for today, and then within 8       seven days of receipt of the transcript we 9       will designate appropriate sections as 10       either highly confidential, confidential, or 11       not confidential. 12       MR. GAFFEY: I think, you know, we 13       can -- that's the agreement from Felder. 14       Let's do that for all of these. 15       MR. STERN: Agreed. 16       MR. GAFFEY: Everybody agree to that? 17       STEVEN BERKENFELD, called as a 18       witness, having been duly sworn by a Notary 19       Public, was examined and testified as 20       follows: 21       EXAMINATION BY 22       MR. GAFFEY: 23       Q.   Good morning, Mr. Berkenfeld. 24       A.   Good morning. 25       Q.   We met briefly before. My name is Bob  TSG Reporting - Worldwide (877) 702-9580</p>

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Gaffey. I'm with Jones Day. We're special**  
3 **counsel to the estate of Lehman Brothers**  
4 **Holdings, Inc.**

5 As you know, the topics that we're  
6 going to address today will revolve around the  
7 transaction that took place in September of 2008  
8 in which Barclays purchased certain assets of  
9 Lehman Brothers Holdings, Inc. and LBI.

10 Let me get some background information  
11 on you first, sir. You're qualified as a  
12 lawyer; is that correct?

13 A. Yes.

14 **Q. Columbia Law School?**

15 A. Yes.

16 **Q. Is your license up to date? Do you**  
17 **maintain an active registration?**

18 A. Yes, I believe my registration is up  
19 to date.

20 **Q. There was a time when you worked for**  
21 **Lehman. Can you give me a brief resumé of your**  
22 **Lehman career? When you started, when you left,**  
23 **and what titles you held?**

24 A. I started in January of 1987 and was  
25 there through the transaction. I had many

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 titles, but at the time of the transaction, I  
3 was a managing director.

4 **Q. And what was your area of**  
5 **responsibility when you were a managing**  
6 **director?**

7 A. There were, over the years, there were  
8 a number of different areas of responsibility.

9 **Q. Okay. Give me, if you would, the last**  
10 **category before you left Lehman. I'm obviously**  
11 **particularly interested in September of 2008,**  
12 **but that segment.**

13 A. I was chairman of the, what we  
14 referred to as the Transaction Approval  
15 Committees, I was Chief Investment Officer for  
16 the Private Equity Division, and I was head of  
17 the Legal, Compliance and Audit Division.

18 **Q. And were you head of the Legal,**  
19 **Compliance and Audit Division in September of**  
20 **2008?**

21 A. Yes.

22 **Q. And just for completeness, before**  
23 **Lehman, you were an associate at Fried Frank,**  
24 **correct?**

25 A. Yes.

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. And were essentially involved in**  
3 **mergers and acquisitions?**

4 A. Yes.

5 **Q. Now, you said that you held these**  
6 **positions at Lehman through the transaction.**  
7 **When exactly did you leave the employ of --**  
8 **actually, withdrawn.**

9 Were you employed by Lehman Brothers  
10 Holdings, Lehman Brothers, Inc., some  
11 combination of both? What was the entity that  
12 employed you?

13 A. I don't know.

14 **Q. Okay. And when exactly did you leave**  
15 **the employ of Lehman?**

16 A. That's actually a good question,  
17 because it's not really precise. I don't know  
18 that I could give you a specific date on that.

19 MR. STERN: You can describe why it's  
20 not precise.

21 A. There was everything from -- there was  
22 sort of a transitional period where many people  
23 were performing services for both Lehman and  
24 starting to perform services for Barclays, too.

25 **Q. Okay. That would be --**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 A. So it was kind of a transitional  
3 period.

4 **Q. As opposed, sir, to the -- I**  
5 **understand that after the transaction closed,**  
6 **there would be transitional work where you had**  
7 **your old Lehman hat on in terms items of**  
8 **knowledge or necessities.**

9 My question, though, is who employed  
10 you and when? Who was your employer on  
11 September 22, 2008?

12 A. September 22, 2008. I don't recall.  
13 I'd have to take a look at where the paychecks  
14 came from.

15 **Q. And the reason I picked September 22,**  
16 **2008, that's the date the transaction closed,**  
17 **correct?**

18 A. Yes.

19 **Q. Okay. And in the period prior to the**  
20 **transaction closing on September 22, had you had**  
21 **any discussions with Barclays about moving into**  
22 **their employ?**

23 A. No.

24 **Q. When did you first begin to have**  
25 **discussions with Barclays about moving into the**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **employ of Barclays?**  
3 A. It was sometime after the closing.  
4 **Q. How far after the closing?**  
5 A. A matter of days.  
6 **Q. Had there been any discussion at all**  
7 **of the possibility of you being employed at**  
8 **Barclays after the transaction? Had there**  
9 **been -- withdrawn.**  
10 Prior to the closings, had there been  
11 any discussion at all of you working for  
12 Barclays after the transaction?  
13 A. Not that I recall.  
14 **Q. When you did have discussions about**  
15 **joining Barclays? With whom did you have them?**  
16 A. Ian Lowitt.  
17 **Q. And when you had those discussions**  
18 **with Mr. Lowitt, was he employed by Lehman or**  
19 **was he employed by Barclays?**  
20 A. I don't think I can answer that.  
21 **Q. Because?**  
22 A. I just don't know what his status was.  
23 **Q. Can you give me a sense of when that**  
24 **was?**  
25 A. My sense would be it would be the  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **in any capacity?**  
3 MR. STERN: Objection to the form.  
4 A. I don't recall any discussions before  
5 that and the discussions with Ian were not as  
6 broad-based as you've described.  
7 **Q. Tell me about the discussions with**  
8 **Ian. Describe them to me, please.**  
9 A. They were really just more on terms.  
10 **Q. So if there's point in the week**  
11 **following the transaction where you're talking**  
12 **about terms with Ian Lowitt, was there a point**  
13 **prior to that where you discussed going to work**  
14 **for Barclays at all? People don't start talking**  
15 **about their salary until they have decided to go**  
16 **work someplace.**  
17 MR. STERN: Objection to the form.  
18 A. I don't recall any conversations  
19 before that.  
20 **Q. What's your recollection of the first**  
21 **conversation you had with anyone about working**  
22 **for Barclays?**  
23 A. My recollection is Ian coming in to  
24 see me about being offered employment by  
25 Barclays post-closing.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 middle of the next week.  
3 **Q. We all talk like that in this case.**  
4 **By "the next week," you mean after the closing?**  
5 A. After the 22nd, so I would -- my best  
6 recollection would be in the Tuesday, Wednesday  
7 timeframe.  
8 **Q. Okay. Now, when you spoke to Mr.**  
9 **Lowitt about working for Barclays, just so I can**  
10 **sort of get in a capsule what the discussion was**  
11 **about, was that about terms of employment,**  
12 **compensation, title, that type of thing, or --**  
13 A. Yes.  
14 **Q. So, moving backwards from that, before**  
15 **you have that discussion, there is a discussion**  
16 **with an employer about the possibility of**  
17 **working for them at all before you get to terms,**  
18 **correct?**  
19 A. Can you repeat the question?  
20 **Q. Well, you're talking to Lowitt in the**  
21 **week after the transaction about terms, what**  
22 **you'll be paid, what your duties and**  
23 **responsibilities will be, what your title will**  
24 **be. At some point prior to that, presumably you**  
25 **had a discussion about going to Barclays at all**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. Just so I have a clear record, Ian**  
3 **coming to see you post-closing?**  
4 MR. GAFFEY: Could you read the last  
5 answer back, please?  
6 (Record read.)  
7 **Q. When you say post-closing, are you**  
8 **modifying when Ian came to see you or when you**  
9 **would be employed?**  
10 A. Both.  
11 **Q. Both, okay.**

REDACTED

15 MR. STERN: This is all highly  
16 confidential so you can feel free to answer.

REDACTED

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 MR. STERN: Objection to the form, but  
3 you can answer.

REDACTED

21 Q. Now, in the, let's say the two weeks  
22 prior to the closing on September 22, to your  
23 knowledge were other officers or executives of  
24 Lehman Brothers in conversations with Barclays  
25 about moving over there to work?

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Yes.

3 Q. Who?

4 A. To my knowledge, there was a very  
5 small group of senior executives who were  
6 approached around signing up to join Barclays  
7 prior to the closing.

8 Q. Who were they?

9 A. I don't think I recall all of them,  
10 but I believe that they included Eric Felder,  
11 Skip McGee, I believe Jerry Donini, Hyung Lee,  
12 Ian Lowitt. I'm not sure of the remainder.

13 Q. Approximately how many more were  
14 there?

15 A. I believe there were eight.

16 Q. Now, when the agreement was made and  
17 during that week, there was a group of eight  
18 people who were deemed critical to the  
19 transaction, correct? And Mr. Felder, Mr.  
20 McGee, Mr. Donini and Mr. Lowitt were among  
21 those eight; is that right?

22 A. That's my understanding. My  
23 recollection.

24 Q. That's why you focused on the eight.  
25 What about beyond the eight? To your

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 A. In what timeframe?

3 Q. In the two weeks before the closing.

4 A. In the two weeks before the closing?

5 Q. Yes.

6 A. No, not during the two weeks before  
7 closing.

8 Q. Okay. What about one week before the  
9 closing?

10 Let me withdraw the question. To your  
11 knowledge, were any officers or directors of  
12 Lehman involved in discussions about going over  
13 to Barclays at any time before the closing?

14 A. Officers or directors of Lehman  
15 Brothers Holdings or Lehman Brothers, Inc.?

16 Q. Either.

17 A. I believe there were discussions that  
18 some senior officers had between the period of  
19 signing and closing. It might have been between  
20 the period from the initiation of negotiations  
21 that Monday morning after the our bankruptcy to  
22 the closing.

23 Q. And again, you're using the same  
24 vernacular I was, but the Monday, September 15,  
25 correct?

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 knowledge, were there discussions with Holdings  
3 or LBI senior executives other than those eight  
4 people?

5 A. Not that I know of.

6 Q. There were none with you?

7 A. None that I recall.

8 Q. Okay. Did you have any conversations  
9 with Mr. Lowitt during that week between signing  
10 and closing?

11 A. Not that I recall.

12 Q. Was there a reason that you didn't  
13 have those discussions?

14 A. Was there a reason? Could you be more  
15 precise?

16 Q. Well, the company you've worked for  
17 since 1987 has filed bankruptcy. It's about to  
18 disappear. You're not going to have a job.

19 Were you talking to anybody about what  
20 you were going to do next?

21 A. I was really focused on trying to get  
22 us from bankruptcy into some sort of  
23 transaction.

24 Q. Is that a yes or a no? Were you  
25 thinking about where you were going to go next?

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. I'm sure I was thinking about it, but  
3 I wasn't actively doing anything about it.  
4 **Q. Were you having conversations with**  
5 **anyone about it?**  
6 A. Nothing specific that I can recall.  
7 **Q. Did you make a decision not to have**  
8 **that conversation with anyone until after the**  
9 **closing?**  
10 A. I wouldn't characterize it as a  
11 deliberate decision. I think I was just focused  
12 on trying to get everything that was going on  
13 and the chaos that was underway somewhat under  
14 control.  
15 **Q. The six of the eight that you**  
16 **mentioned, Felder, McGee, Donini, Lee and**  
17 **Lowitt, were any of them involved in the**  
18 **negotiations with Barclays at the transaction?**  
19 A. I believe that was five.  
20 **Q. You're absolutely right.**  
21 A. I believe Skip McGee was involved in  
22 the negotiation. I don't know if any of the  
23 others were.  
24 **Q. Were any of the others playing any**  
25 **supporting role in connection with the**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **you entered on duty, when you began your**  
3 **employment there?**  
4 A. I signed an agreement to begin  
5 employment somewhere around September 27 or  
6 September 28, I recall.  
7 **Q. What's your title at Barclays Capital?**  
8 A. Managing director.  
9 **Q. And what's your area of**  
10 **responsibility?**  
11 A. I'm in the Investment Banking  
12 Division.  
13 **Q. What's your job there? What do you**  
14 **do?**  
15 A. I chair a few committees to approve  
16 equity transactions, fairness opinions, and I'm  
17 involved in various different capacities in  
18 investment banking transaction development.  
19 **Q. And to whom do you report?**  
20 A. To Skip McGee and Steve Hash.  
21 **Q. Is Mr. Hash one of the eight?**  
22 A. I don't believe so.  
23 (Exhibit 17, a document bearing Bates  
24 Nos. BCI-EX-00077288 through 77290, marked  
25 for identification, as of this date.)  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **transaction, if not face-to-face negotiations**  
3 **with Barclays?**  
4 A. I don't know the role that others on  
5 Barclays were playing.  
6 **Q. Do you have any clue the role Mr.**  
7 **Lowitt may have played or not played?**  
8 A. I don't recall.  
9 **Q. Any recollection of it at all?**  
10 A. No.  
11 **Q. Any recollection at all of the role**  
12 **that Mr. Donini played or not?**  
13 A. I don't know of any role that he  
14 played.  
15 **Q. And no recollection at all of any role**  
16 **that Mr. Felder may have played?**  
17 A. I don't know of any role that Eric may  
18 have played.  
19 **Q. And you're currently employed by**  
20 **Barclays, correct?**  
21 A. Correct.  
22 **Q. What entity of Barclays?**  
23 A. Barclays Capital.  
24 **Q. And forgive me if I'm repeating**  
25 **myself, but do you have a recollection of when**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. Mr. Berkenfeld, I've placed before you**  
3 **what the court reporter has marked as Exhibit**  
4 **17. Do you recognize the document?**  
5 A. Yes.  
6 **Q. What is it?**  
7 A. It's my employment agreement with  
8 Barclays Capital.  
9 **Q. And if you'd turn to the last page of**  
10 **the document bearing Bates number BCI-EX-77290?**  
11 A. Yes.  
12 **Q. Is that your signature at the bottom?**  
13 A. Yes.  
14 **Q. And the date you'll see is September**  
15 **29, '08?**  
16 A. Yes.  
17 **Q. That's the date on which you accepted**  
18 **Barclays offer of employment?**  
19 A. Correct.  
20 **Q. If you would look at the first page of**  
21 **the document, it's dated September 22, you see**  
22 **that?**  
23 A. Yes.  
24 **Q. Is that the date on which Barclays**  
25 **offered you employment?**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. I don't recall. I don't believe this  
3 was given to me on the 22nd.  
4 **Q. Is there a reason it's dated the 22nd**  
5 **that you know?**  
6 A. No.

REDACTED

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2  
3 A. I don't know that I can answer that  
4 question why Barclays was doing it. Could you  
5 be more precise on the question?

REDACTED

8 A. Yes.  
9 **Q. Why did they give you that?**  
10 A. I don't know why, what motivated them  
11 to do it.  
12 **Q. To your knowledge, was that in some**  
13 **part required by the Asset Purchase Agreement**  
14 **that you signed on September 16?**  
15 A. To my knowledge, it was not required  
16 by the Asset Purchase Agreement for them to pay  
17 me this amount.

REDACTED

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

REDACTED

17 A. Can you repeat the question?  
18 (Record read.)  
19 A. I believe there were a group of  
20 employees that were identified by others from  
21 Lehman who received offers of employment and  
22 written employment agreements.  
23 **Q. How large was that group?**  
24 A. That's speculation on my part.  
25 **Q. What's your best estimate?**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. About 150.

REDACTED

10 A. That was my understanding.  
11 **Q. And was it your understanding that**  
12 **that payment of bonuses that they didn't get**  
13 **from Lehman was in any way connected to the**  
14 **Asset Purchase Agreement?**  
15 A. In any way connected?  
16 MR. STERN: I'll object to the form,  
17 but you can answer, if you understand the  
18 question.  
19 A. I am aware that the Asset Purchase  
20 Agreement had a provision in it that created an  
21 obligation on the part of Barclays to pay a  
22 certain amount of compensation to employees.  
23 That compensation took the form, many different  
24 forms, including severance payments and bonus  
25 payments.

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**REDACTED**

10 Q. I hear that.

11 What was the total amount that  
12 Barclays was obliged to pay under that  
13 provision, do you recall?

14 A. That's a more complicated question,  
15 but the provision made reference to an amount of  
16 estimated amount of 2 billion.

17 Q. And your understanding, sir, is that  
18 estimated amount of 2 billion was for bonuses  
19 and severance and other types of compensation; I  
20 think that's what you said?

21 A. Correct.

22 Q. Not just limited to bonuses?

23 A. Correct.

24 Q. We'll come to that agreement.  
25 Obviously, I'm going to spend some time with it  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD

2 Q. Thank you.  
3 Anyone else?

4 A. I believe Mark Shapiro was involved.  
5 Jim Seery was involved. Alex Kirk I believe was  
6 involved.

7 Q. Kirk?

8 A. Kirk. K-I-R-K.

9 There may be a few additional bankers  
10 that were involved but in more secondary roles.

11 Q. Who were they?

12 A. To my recollection, Jeff Weiss may  
13 have been involved. Brad Whitman may have been  
14 involved. That's recollection, and that may not  
15 be --

16 Q. There could be others, you just don't  
17 remember?

18 A. And their role may have been minor.

19 Q. Now, in order to do the --

20 A. Excuse me. And -- just to finish --  
21 and there may have been others that I don't  
22 recall.

23 Q. Yeah, that's what I said, there may  
24 have been more. Just so our record is clear,  
25 that may not be a complete list. That's the

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD

2 today, but do you have a general recollection --  
3 let me ask you, were you involved in the  
4 negotiations of Asset Purchase Agreement?

5 A. I was involved in the preparation and  
6 drafting of the Asset Purchase Agreement.

7 Q. Okay. Those are different verbs than  
8 I asked. Let me -- I want to get the best idea  
9 I can of --

10 A. The distinction I'm drawing is that  
11 the negotiation of the Asset Purchase Agreement  
12 covers, in my mind, negotiation of the business  
13 deal. I was not involved in the negotiation of  
14 the business deal. I was involved in the  
15 lawyering of the Asset Purchase Agreement.

16 That's another verb, but I think that  
17 best describes it.

18 Q. Thank you. Who was involved in  
19 negotiating the business deal on Lehman's  
20 behalf?

21 A. To my recollection, Bart McDade, Skip  
22 McGee, and Mark Shafir.

23 Q. Would you spell "Shafir" for the  
24 reporter, please? Is it S-H-A-F-I-R.

25 A. S-H-A-F-I-R.

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD

2 best you can recall as you sit here?

3 A. That's correct. It may not be a  
4 complete list. There may have been others.

5 Q. When you say Dave McGee and Shapiro,  
6 who you identified as -- never mind. The record  
7 is clear.

8 Now, can you give me a little more  
9 detail on what your role was when you say you  
10 were involved in the drafting and the, to use  
11 your verb, lawyering of the APA?

12 A. After the bankruptcy filing, as you  
13 can imagine, there were hundreds, thousands of  
14 issues that no one had ever considered or had  
15 prepared for. Over the course of the next few  
16 days, after the bankruptcy filing, I was trying  
17 to deal with as many of those issues as  
18 possible.

19 While I was spending much of my time  
20 doing that, negotiations had commenced with  
21 Barclays on a proposed asset purchase. Over the  
22 course of Monday and Tuesday, I became more  
23 involved in those negotiations or lawyering, not  
24 in the negotiations of the business deal but in  
25 the preparation of the documentation, and at

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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       some point on Tuesday was able to join the  
3       drafting session that was going on with the  
4       attorneys for both Lehman and Barclays and try  
5       to put together an Asset Purchase Agreement.

6       **Q. When was the business deal negotiated?**

7       A. I believe it was negotiated over the  
8       course of Monday and Tuesday.

9       **Q. Did the negotiations of the business**  
10      **deal take place through the night on Monday and**  
11      **into Tuesday morning?**

12      A. I don't recall exactly how late they  
13      went and when they might have been recessed or  
14      interrupted.

15      **Q. Do you know a man named Martin Kelly?**

16      A. Yes.

17      **Q. Who is Martin Kelly?**

18      A. Martin Kelly I believe was the  
19      controller for Lehman Brothers at the time of  
20      the bankruptcy.

21      **Q. Did he play any role in the**  
22      **negotiation of the business deal?**

23      A. Not that I know of.

24      **Q. Did he work for anybody who did play a**  
25      **role?**

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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2       A. I'd say I think I understood the  
3       business terms at the time.

4       **Q. What did you understand them to be?**

5       A. I understood that Barclays was paying  
6       a certain amount for the real estate of Lehman;  
7       they were paying a certain amount for the going  
8       concern value of Lehman Brothers, the franchise  
9       value; they were taking on a certain amount of  
10      assets and assuming certain liabilities, and  
11      liabilities that were being assumed included  
12      compensation obligations and obligations for  
13      cure payments.

14      **Q. Again, I'll have documents for you in**  
15      **a while, sir, but do you recall what they were**  
16      **to pay for the real estate?**

17      A. I recall that there was an estimated  
18      amount, but it was subject to adjustment for  
19      appraisal.

20      **Q. Apart from the real estate, do you**  
21      **recall the certain amount that was to be paid**  
22      **for what you called going concern value of the**  
23      **franchise?**

24      A. I believe it was, the best of my  
25      recollection, it was approximately 250 million.

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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2       A. Martin work for Ian Lowitt, and I  
3       don't know what Ian Lowitt's role was in the  
4       negotiation of the business deal.

5       **Q. In order to do the work that you**  
6       **described in connection with putting the paper**  
7       **together for the deal, you needed to understand**  
8       **the business terms, correct?**

9       A. The lead on putting the papers  
10      together for the business deal was taken by Weil  
11      Gotshal. They were the ones that were in the  
12      lead role and needed to document what was being  
13      told to them by the business people.

14      **Q. By the time you joined, on Tuesday,**  
15      **joined the drafting folks, did you have an**  
16      **understanding of the business terms?**

17      A. I was playing catch-up in trying to  
18      understand what the business terms were.

19      **Q. Did there come a point on that day**  
20      **when you did understand what the business terms**  
21      **were?**

22      A. I believe so.

23      **Q. When you say you believe so, do you**  
24      **have some doubt that you understood them at the**  
25      **time, or you have a lack of recollection?**

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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2       **Q. Okay. And were the assets that**  
3       **Barclays was taking on identified in any way**  
4       **with some degree of specificity?**

5       A. At what time?

6       **Q. I'm still at the point where you've**  
7       **come into the room and you have an understanding**  
8       **of the terms of the deal.**

9       A. I think that the -- it was very much a  
10      dynamic process and there were attempts being  
11      made to estimate a pool of assets, but that was  
12      still a very fluid process.

13      **Q. When you were able to join the folks**  
14      **that were drafting on Tuesday, did you have an**  
15      **understanding of what the range was at that**  
16      **point of the value of that pool of assets?**

17      A. Yes.

18      **Q. What was your understanding?**

19      A. My understanding was that the pool of  
20      assets that were being acquired was  
21      approximately 72 billion.

22      **Q. And who had put together that -- who**  
23      **had determined that number? Who was involved in**  
24      **that?**

25      A. I don't know.

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Q. Do you have any recollection of who**  
3 **was involved in valuing the assets that were to**  
4 **be transferred? Was there a team put together?**  
5 **Was there somebody in charge of it?**

6 A. I don't know who arrived at that  
7 number.

8 **Q. Okay.**

9 A. That it should be 72 instead of 62 or  
10 50 or 12. I don't know. I do know that a  
11 schedule that was being prepared was being  
12 presented to me by I believe Martin Kelly/Paolo  
13 Tonucci. It may have been one or other or a  
14 combination. I don't recall exactly.

15 **Q. So I get a sense of the corporate**  
16 **hierarchy, who works for who amongst Martin**  
17 **Kelly and Paolo Tonucci, who's more senior?**

18 A. I think at the time at Lehman Brothers  
19 they were about the same.

20 **Q. About the same?**

21 A. About the same.

22 **Q. And do you have a -- I know you**  
23 **wouldn't know what they were doing minute to**  
24 **minute, there was a lot going on that day, but**  
25 **do you have a general sense of what Martin**

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Kelly/Paolo Tonucci did to come up with that**  
3 **schedule?**

4 A. I don't.

5 **Q. Do you have any idea at all?**

6 A. No, I don't.

7 **Q. Did they never talk to you about the**  
8 **process that they used to come up with that**  
9 **schedule?**

10 A. About the process, no, they did not.

11 **Q. Did they talk to you about what steps,**  
12 **if any, were taken to go through different asset**  
13 **classes and determine their value?**

14 A. They did not.

15 **Q. Do you know if the schedule came from**  
16 **Lehman's marks at the time of those asset**  
17 **classes?**

18 A. I don't know where the schedule came  
19 from.

20 **Q. You're being sort of emphatic about**  
21 **the "I don't know." Let me see if I can push**  
22 **that.**

23 **Did anybody in the drafting room need**  
24 **to know that fact?**

25 MR. STERN: Objection to the form. I

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 don't know what that means.

3 **Q. I'm looking for -- let me withdraw.**  
4 **Let me explain what I'm looking for, and he's**  
5 **going to object to the form, but that's fine. I**  
6 **might be able to move through this a little more**  
7 **quickly.**

8 **What I'm trying to do, Mr. Berkenfeld,**  
9 **is to get a sense of who's doing what on**  
10 **Tuesday. Who's figuring out what assets are**  
11 **going, who is figuring out what document you**  
12 **need to do it, you know? So who's -- and you've**  
13 **told me Kelly and Tonucci put together this**  
14 **schedule.**

15 **Tell me what you know about what they**  
16 **did to get that schedule put together.**

17 A. Tuesday was a very, as was Monday,  
18 crazy and hectic day.

19 **Q. I'll ask you later which was worse.**

20 A. And people were involved in different  
21 tasks --

22 **Q. Uh-huh.**

23 A. -- in somewhat of a vertical approach.  
24 You might have been involved in many different  
25 verticals, but this was "all hands on deck."

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD

2 **Q. Right.**

3 A. Paulo Tonucci, who was the treasurer  
4 of Lehman, and Martin Kelly, was the controller,  
5 were two of the most senior people on the  
6 finance staff. So the people in the room,  
7 myself, the outside counsel, Weil Gotshal,  
8 Simpson Thacher on behalf of Lehman Brothers,  
9 were relying on them to put together the list of  
10 assets that were the assets that were estimated  
11 at the time would be transferred over to  
12 Barclays.

13 **Q. Give me a sense of the physical**  
14 **setting. Was there a war room set up somewhere?**

15 A. We were all camped out on the 32nd  
16 floor of Lehman Brothers' offices. The 32nd  
17 floor is the executive dining rooms, so there's  
18 a series of rooms that can be used as conference  
19 rooms there.

20 **Q. Right.**

21 A. Tables and chairs. Activity was going  
22 on throughout the floor. There was a lot of  
23 discussions going on in the main reception area.  
24 There were discussions going on in the hallways.  
25 The drafting session occurred in a corner

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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 conference room which had a relatively large  
3 table, a lot of chairs around it, and kind of a  
4 sitting area right outside it, and so the  
5 activity was occurring in -- the drafting  
6 activity was occurring in that seating area in  
7 that conference room, which smaller than this,  
8 tighter than this. Table little smaller. Walls  
9 a little smaller.  
10    **Q. Where is the, for lack of a better**  
11 **term, add-up-the-assets room? Where are Kelly**  
12 **and Tonucci? Are they on the 32nd floor?**  
13    A. Martin and Paolo would bring things to  
14 the 32nd floor --  
15    **Q. Okay.**  
16    A. -- would come to the 32nd floor, but  
17 my belief was they were working in their  
18 offices.  
19    **Q. And do you remember who, if anyone**  
20 **else, was working with Martin Kelly and Paolo**  
21 **Tonucci on estimating the assets that were to be**  
22 **transferred?**  
23    A. I don't know who else they had on  
24 their teams.  
25    **Q. That's a sort of vertical entry.**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Gotshal team that was there. John Findley and  
3 Andy Keller from Simpson Thacher. There was  
4 counsel representing Barclays.  
5    **Q. Who do you recall representing**  
6 **Barclays? It's Cleary Gottlieb, right?**  
7    A. Cleary Gottlieb.  
8    **Q. Who from Cleary?**  
9    A. Victor Lewkow, I believe. And Jay  
10 Layton from Sullivan Cromwell.  
11    **Q. Remember anyone else on that side of**  
12 **the table?**  
13    A. I wouldn't know their names.  
14    **Q. And the usual assortment of suits and**  
15 **yellow pads, right? But those are the two you**  
16 **recall being involved in the discussions, the**  
17 **drafting?**  
18    A. Victor was the lead on that.  
19    **Q. And who, you know, delivered to this**  
20 **group the business terms that needed to be**  
21 **written up?**  
22    A. I don't know.  
23    **Q. Who delivered to the Lehman side of**  
24 **the table the business terms that needed to be**  
25 **written up, do you know?**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Anybody else at their level involved in that?**  
3 **Any other senior executives involved other than**  
4 **Martin Kelly and Paolo Tonucci?**  
5       MR. STERN: Objection to the form.  
6    A. Involved in what, precisely?  
7    **Q. In estimating the assets that were**  
8 **going to be transferred?**  
9    A. In estimating the assets?  
10   **Q. That's our verb, not mine, sir, so**  
11 **that's why I'm using it.**  
12    A. When you say "estimating assets," are  
13 you asking me estimating the value of the  
14 assets?  
15   **Q. Yes.**  
16    A. Not that I know of.  
17   **Q. And I asked you a few moments ago who**  
18 **was involved in negotiating the business terms.**  
19 **Who was involved on the drafting side? There**  
20 **was you and who else?**  
21    A. The drafting was led principally by  
22 the outside counsel.  
23   **Q. What names do you remember?**  
24    A. Mr. Lubowitz of Weil Gotshal. I  
25 believe -- I don't remember the rest of the Weil  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2    A. I don't know.  
3    **Q. To whom were those business terms**  
4 **delivered, do you know?**  
5    A. Speculating, I believe they were  
6 delivered to Mike Lubowitz.  
7    **Q. There comes a point on that Tuesday**  
8 **morning where you, you learn the business terms,**  
9 **correct?**  
10    A. Yes.  
11   **Q. Okay. Who told them to you?**  
12    A. I don't recall if anyone specifically  
13 went through them with me or if I learned them  
14 through the process of joining the discussions  
15 and reviewing the agreement.  
16   **Q. Okay. On a more general level, and**  
17 **I'm still on the Tuesday morning, do you have a**  
18 **recollection of talking to any Lehman people**  
19 **about the business terms?**  
20    A. I don't have a recollection.  
21   **Q. I'm sort of separating that from what**  
22 **they said to you, but talking to McGee, for**  
23 **example, finding out this is the deal?**  
24    A. I just --  
25       MR. STERN: Objection to the form. I  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2       don't know if there's a question.  
3       **Q. Do you have a recollection of talking**  
4 **to anyone about the business terms, McGee, for**  
5 **example?**  
6       A. With everything going on, I just don't  
7 recall.  
8       **Q. Do you have any knowledge as to**  
9 **whether it was one of the three that you**  
10 **mentioned to me, McDade, McGee or Shafir?**  
11       A. I don't recall.  
12       **Q. Do you have a general recollection of**  
13 **talking to Shapiro, Seery, Kirk about the**  
14 **business terms? Again, I'm on the Tuesday.**  
15       A. I don't specifically recall --  
16       **Q. Right.**  
17       A. -- a conversation with anyone on the  
18 business side. I can't say that it didn't  
19 happen. I just don't recall.  
20       **Q. I'm getting a sense that this room is**  
21 **not exactly calm and cool. There's a lot of**  
22 **activity going. There's lawyers in the corner**  
23 **drafting, there's people running schedules**  
24 **upstairs, there's people in the reception area,**  
25 **so I understand the questions are a little**  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2       9/16/2008, 11:18 A.M., marked for  
3 identification, as of this date.)  
4       **Q. Mr. Berkenfeld, I've put before you a**  
5 **document that was marked at a prior deposition,**  
6 **which is marked as Exhibit 1, and for the**  
7 **record, I've also had put before you these two**  
8 **newly marked exhibits.**  
9       What has been marked as Exhibit 18 is  
10 a one-page document marked "Confidential"  
11 bearing Bates number BCI-CG00033789, which has a  
12 date and time stamp in the lower right-hand  
13 corner reading 9/16/2008, 10:09 A.M., and we've  
14 marked as Exhibit 19 a document with no Bates  
15 number, one-page document, showing columns of  
16 assets and liabilities, and in the lower  
17 right-hand corner says 9/16/2008, 11:18 A.M.  
18       Now, if you would turn, sir, to the  
19 document previously marked as Exhibit 1, the  
20 Asset Purchase Agreement. You've seen that  
21 before, I take it?  
22       A. Yes.  
23       **Q. And just so our record is a good one,**  
24 **could you turn to the last page of that**  
25 **document, please? And does your signature**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **precise for that atmosphere.**  
3       What I'm trying to press for here is  
4 even your general recollection of a point where  
5 somebody -- where you came to understand this is  
6 the deal we're making.  
7       A. And my response is that I don't recall  
8 a moment of realization.  
9       **Q. Okay. No lightbulb?**  
10       A. Not to be -- it's just there was so  
11 much going, and at some point on Tuesday, which  
12 could have been at 2 in the afternoon or could  
13 have been at 6 in the evening, could have been  
14 10 o'clock at night, I was involved enough to  
15 understand what the transaction was.  
16       **Q. Okay.**  
17       A. And I just don't recall when that was.  
18       (Exhibit 18, a document bearing Bates  
19 Nos. BCI-CG00033789, which has a date and  
20 time stamp in the lower right-hand corner  
21 9/16/2008, 10:09 A.M., marked for  
22 identification, as of this date.)  
23       (Exhibit 19, one-page document,  
24 showing columns of assets and liabilities,  
25 and in the lower right-hand corner says  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **appear under the block "Lehman Brothers**  
3 **Holdings, Inc."?**  
4       A. Yes.  
5       **Q. And does your signature also appear**  
6 **under the block "Lehman Brothers, Inc."?**  
7       A. Yes.  
8       **Q. Does that help your recollection of**  
9 **which entity employed you?**  
10       A. No.  
11       **Q. Okay. You were, though, a Vice**  
12 **President of Lehman Brothers Holdings, Inc., I**  
13 **take it?**  
14       A. Yes.  
15       **Q. And you were a Managing Director of**  
16 **Lehman Brothers, Inc., correct?**  
17       A. Yes.  
18       **Q. And when did you put your signature to**  
19 **that document? Actually, you know what?**  
20 **Withdrawn.**  
21       There was a version of this document  
22 with a lot of handwritten interlineations. This  
23 is not the one. This is taken from a filing.  
24 So let me just ask you generally without  
25 reference to that document. When did you sign  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **the Asset Purchase Agreement?**  
3 A. I don't remember precisely when.  
4 **Q. Was it on the Tuesday?**  
5 A. I believe it was late -- I know it was  
6 late in night, early in the morning.  
7 **Q. Uh-huh. Okay. On or around the**  
8 **Tuesday?**  
9 A. Yes.  
10 **Q. And take a look, please, sir, at what**  
11 **we've marked as Exhibit 18. Tell me if you**  
12 **recognize that document.**  
13 A. Yes.  
14 **Q. What is that document?**  
15 A. That is a schedule of assets and  
16 liabilities.  
17 **Q. And there's an annotation in the upper**  
18 **right-hand corner of that document which appears**  
19 **to read "9/16/08" and, to me, "SB," do you see**  
20 **that?**  
21 A. Yes.  
22 **Q. Are those your initials?**  
23 A. Yes.  
24 **Q. Tell me what you remember the**  
25 **circumstances putting your initials on that**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. Okay. What's the story with these two**  
3 **documents? Why does one have your initials and**  
4 **the other say same initials, same date, and this**  
5 **one -- and 19 says final?**  
6 A. The second exhibit, Exhibit 19 --  
7 **Q. Uh-huh.**  
8 A. -- was produced later and superseded  
9 the earlier exhibit. So it again was signed to  
10 acknowledge that it was final and actually  
11 annotated as final when we had the sign-off from  
12 Finance that this was the final schedule.  
13 **Q. "This" being 19?**  
14 A. "This" being 19.  
15 **Q. And when you say you got the sign-off**  
16 **from Finance, who in Finance?**  
17 A. Martin/Paolo.  
18 **Q. And tell me everything you remember**  
19 **about getting the sign-off from Martin/Paolo**  
20 **that these were the final numbers?**  
21 A. I don't remember much more than saying  
22 this is the final schedule.  
23 **Q. Do you remember who they handed it to?**  
24 **To you, I take it?**  
25 A. They handed it to the room.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **document.**  
3 A. We discussed previously schedules that  
4 were being prepared by Martin/Paolo --  
5 **Q. Uh-huh.**  
6 A. -- that were being provided. There  
7 were a number of drafts of these schedules being  
8 produced. So at some point, to document a final  
9 draft, I initialed a schedule.  
10 **Q. To separate it from working drafts?**  
11 A. Exactly.  
12 **Q. Now, you'll see, sir, that -- take a**  
13 **look at 19.**  
14 A. Yes.  
15 **Q. And again, at the top says "SB."**  
16 **Those are your initials as well, correct?**  
17 A. Yes.  
18 **Q. Okay. And this also says 9/16/08?**  
19 A. Yes.  
20 **Q. And --**  
21 A. Final.  
22 **Q. And final.**  
23 **Is that your handwriting at the top**  
24 **where it says "final" as well?**  
25 A. Yes.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. Okay. And what did they say when they**  
3 **handed it to the room?**  
4 A. I don't recall.  
5 **Q. How did they describe this document**  
6 **when they handed it to the room?**  
7 A. I don't recall.  
8 **Q. What did you understand the document**  
9 **to be when they handed it to the room?**  
10 A. The final estimated schedule.  
11 **Q. Okay. And the final estimated**  
12 **schedule of the assets that were to be**  
13 **transferred and the liabilities that were to be**  
14 **undertaken in the transaction, correct?**  
15 A. No, I wouldn't characterize it that  
16 way. I would characterize it as the final  
17 schedule of the estimate of assets and  
18 liabilities that would be transferred over. I'm  
19 not sure I was clear on that, but the schedule  
20 was not part of the agreement.  
21 **Q. Uh-huh. There is one point in the**  
22 **agreement where it's referred to, correct? In**  
23 **the employment section in the bonus and**  
24 **compensation provision we were talking about**  
25 **before?**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. If you would like, we can take a look  
3 at that provision.  
4 **Q. I'll get to it later. But I don't**  
5 **want you to make a misstatement about the**  
6 **section I know is in there.**  
7 **It's not attached to the agreement as**  
8 **a schedule, right?**  
9 A. That's what I said.  
10 **Q. Is there a reason --**  
11 A. I believe that's what I said.  
12 **Q. Is there a reason it was not attached?**  
13 A. It wasn't attached because it wasn't  
14 meant to be a part of the agreement.  
15 **Q. The estimate of the asset values in**  
16 **here was the estimate upon which the transaction**  
17 **was based, correct?**  
18 A. The estimate of the assets was an  
19 estimate of assets that would be transferred  
20 over. At that point in time, the belief of the  
21 assets that would be transferred over to  
22 Barclays kind of as guidance for what was meant  
23 in the Asset Purchase Agreement when there was a  
24 reference to purchased assets.  
25 (Recess; Time Noted: 10:20 A.M.)  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. Were you involved in discussions,**  
3 **negotiations of business terms in those -- that**  
4 **prior set of negotiations?**  
5 A. No, I was not.  
6 **Q. And those negotiations, as I**  
7 **understand it, did not come to fruition? No**  
8 **deal resulted from those, that set of prior**  
9 **negotiations, correct?**  
10 A. That's correct.  
11 **Q. In the drafting in connection with the**  
12 **transaction that's brought us here today, in**  
13 **connection with the drafting of the September**  
14 **16th, 2008 Asset Purchase Agreement, were any**  
15 **documents that had been generated in connection**  
16 **with the prior transactions used, any draft**  
17 **agreements, any schedules, that kind of thing?**  
18 A. I don't believe so. The original  
19 transaction was set up more as a public company  
20 merger and a document was being prepared through  
21 Simpson Thacher. Once Lehman filed for  
22 bankruptcy --  
23 **Q. I got it.**  
24 A. -- the lead role for the transaction  
25 was taken over by Weil Gotshal for Lehman, and I  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 (Time Noted: 10:36 A.M.)  
3 BY MR. GAFFEY:  
4 **Q. Mr. Berkenfeld, before I go back to**  
5 **this topic of the assets and the schedules, I**  
6 **wanted to go back to the negotiation process**  
7 **again because there's a time period I neglected**  
8 **to cover.**  
9 **Prior to the bankruptcy filing, to**  
10 **your knowledge had there been discussions**  
11 **between Lehman and Barclays concerning a**  
12 **potential transaction?**  
13 A. Yes.  
14 **Q. When did those take place?**  
15 A. Thursday, Friday into Saturday,  
16 Sunday.  
17 **Q. And that's the Thursday, Friday,**  
18 **Saturday, Sunday, before the 15th?**  
19 A. Yes.  
20 **Q. Were you involved in those**  
21 **discussions?**  
22 A. Some of them, yes.  
23 **Q. What was the nature of your**  
24 **involvement, generally?**  
25 A. As a senior lawyer for Lehman.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 believe a whole different -- different form of  
3 agreement with different counsel taking the  
4 lead.  
5 **Q. Was there any need to estimate or**  
6 **calculate the value of the particular asset**  
7 **classes in connection with the prior**  
8 **negotiations?**  
9 A. In the prior negotiations, there was  
10 no need to calculate the value of assets or  
11 liabilities. It would have just been relevant  
12 in terms of the purchaser's due diligence.  
13 **Q. Was any schedule like Exhibits 18 or**  
14 **19 put together in connection with the prior**  
15 **transaction?**  
16 A. Not that I'm aware of.  
17 **Q. So, as far as you can say, as far as**  
18 **you know, the schedules that we have marked as**  
19 **18 and 19 were put together in connection with**  
20 **the transaction that actually occurred, the one**  
21 **that was signed during the week of the 15th?**  
22 A. That's correct.  
23 **Q. And just another follow-up on**  
24 **something we talked about before the break, and**  
25 **that's the issue of people moving from Lehman to**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Barclays, were there lists put together of**  
3 **people who would be offered employment or**  
4 **recommended to be offering employment at**  
5 **Barclays?**  
6 A. I believe there were.  
7 **Q. Were you involved in putting those**  
8 **lists together?**  
9 A. I was only involved as it related to  
10 people I was responsible for managing.  
11 **Q. And did you put together lists like**  
12 **that?**  
13 A. Yes.  
14 **Q. And during what period of time did you**  
15 **put those lists together?**  
16 A. I don't remember.  
17 **Q. Do you recall sending over a list to**  
18 **Barclays on or about September 19?**  
19 A. I don't remember the date, and it  
20 would not have been to Barclays. I was working  
21 with our HR Department.  
22 **Q. Okay.**  
23 A. I believe the HR Department was the  
24 one who was assembling the list with input --  
25 **Q. Okay.**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **there negotiated?**  
3 A. Between who?  
4 **Q. Between you and Barclays.**  
5 A. No.  
6 **Q. Was there any negotiation at all**  
7 **between you and Barclays of the terms of the**  
8 **agreement?**  
9 A. No.  
10 **Q. Did you just take the numbers that**  
11 **they put in an offer letter to you?**  
12 A. I had a decision to make on the  
13 numbers that were presented to me in the offer  
14 letter, that's correct.  
15 **Q. And prior to seeing the numbers in the**  
16 **offer letter, had you had any discussions with**  
17 **anybody about what those numbers would be?**  
18 A. The discussion I had was with Ian  
19 Lowitt, who told me what the terms of the offer  
20 would be.

REDACTED

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. -- from me and other managers.  
3 **Q. And to your knowledge, were those**  
4 **lists sent, the lists that were being assembled,**  
5 **then sent over to Barclays?**  
6 A. To my knowledge, they were.  
7 **Q. Did people who were on those lists get**  
8 **told they were on those lists?**  
9 A. Eventually, yes.  
10 **Q. You put together lists for people for**  
11 **whom you were responsible, for departments for**  
12 **which you were responsible. Who put together**  
13 **similar lists for other groups or departments?**  
14 A. I don't know.  
15 **Q. Did you have any knowledge at all?**  
16 A. I would speculate that it was the  
17 people who were responsible for those  
18 departments.  
19 **Q. Was that process being done prior to**  
20 **the closing?**  
21 A. I don't recall exactly when it was  
22 done.  
23 **Q. And again, a little follow-up from**  
24 **this morning. Your employment agreement, which**  
25 **we marked as Exhibit 17, were the numbers in**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

REDACTED

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

**REDACTED**

9 **Q. Now, you started -- we talked about**  
10 **the exact date, and I don't care -- you started**  
11 **sometime in September of 2008, correct?**

12 **A. The agreement actually says the**  
13 **employment commences on or before October 31.**

14 **Q. Okay. A date -- so we haven't hit**  
15 **your first anniversary yet?**

16 **A. That's correct.**

**REDACTED**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

**REDACTED**

12 **Q. Take a look, please, at Exhibit 19.**  
13 **That's the one marked "final."**

14 **A. Yes.**

15 **Q. All right. Is that an accurate**  
16 **description? Were there any drafts of this**  
17 **after the one that you initialed and marked as**  
18 **final?**

19 **A. Not that I'm aware of.**

20 **Q. And down in the lower right-hand**  
21 **corner in the Liabilities column there's an item**  
22 **called Comp 2.0, do you see that?**

23 **A. Yes.**

24 **Q. I take it the numbers on this are in**  
25 **billions?**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 **A. That's correct.**

3 **Q. Okay. So is that a \$2 billion accrual**  
4 **for compensation?**

5 **MR. STERN: Objection to the form.**

6 **A. It's a number that's listed as 2**  
7 **billion for comp. I don't know that it's an**  
8 **accrual.**

9 **Q. Do you know what it is?**

10 **A. It's a liability for -- of 2 billion**  
11 **for comp that's estimated on the schedule.**

12 **Q. Do you know the source of that \$2**  
13 **billion liability for comp that's listed on the**  
14 **schedule?**

15 **A. The source of all the numbers on this**  
16 **schedule were the same source. From our Finance**  
17 **Department.**

18 **Q. That would be Kelly/Tonucci?**

19 **A. Correct.**

20 **Q. Now, do you know if the 2 billion**  
21 **listed for comp on that schedule bore any**  
22 **relation to the amount accrued for bonuses as of**  
23 **August of 2008 for Lehman employees?**

24 **A. I don't have any direct knowledge.**

25 **Q. Do you have any indirect knowledge?**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 **A. No.**

3 **Q. Do you have any knowledge at all?**  
4 **MR. STERN: Objection to form.**

5 **Q. About that?**

6 **A. Just hearsay.**

7 **Q. Tell me what that is. What hearsay do**  
8 **you have?**

9 **A. I just -- well, there was an**  
10 **understanding as this came through that this**  
11 **related to what was accrued, but I don't have**  
12 **any direct knowledge of it.**

13 **Q. From whom did you gain -- did you**  
14 **garner that understanding?**

15 **A. I think in the delivery of the**  
16 **schedule at the time of the signing.**

17 **Q. And did you understand it to be an**  
18 **accrual for bonuses or an accrual for more than**  
19 **bonuses?**

20 **A. I understood it to be relevant to the**  
21 **provisional compensation in the Asset Purchase**  
22 **Agreement.**

23 **Q. You make a fair point. I think you**  
24 **told me it's not an accrual, so let me rephrase**  
25 **the question.**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Did you understand it to be an**  
3 **estimate or a calculation of some kind --**  
4 **withdrawn. Did you have any knowledge one way**  
5 **or the other when you saw this schedule as to**  
6 **whether it bore -- the \$2 billion number for**  
7 **comp bore any relation to accruals for bonus**  
8 **liability?**  
9 A. I understood it as an estimate of the  
10 obligation that was set out in the Asset  
11 Purchase Agreement in the compensation section.  
12 Q. Okay. The compensation section of the  
13 Asset Purchase Agreement covers severance and  
14 covers bonuses, correct?  
15 A. As I recall.  
16 Q. Okay. Was it your understanding that  
17 this estimate related to both severance and to  
18 bonuses?  
19 A. That is correct.  
20 Q. Again, for 19, sir, do you know if the  
21 figures there on the asset side for these asset  
22 classes of government agency, commercial paper,  
23 et cetera, bore any relation to the marks at  
24 which they were shown on Lehman's books?  
25 A. My understanding is that they were  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Q. Was it your understanding that the  
3 economics of the transaction involved a \$5  
4 billion overall loss to Lehman versus its marks?  
5 A. I have never been informed of that.  
6 Q. Have you ever seen any document that  
7 says that?  
8 A. Not that I recall.  
9 Q. So when you were involved in the  
10 drafting of the agreement, it was not part of  
11 your knowledge that -- you did not have an  
12 understanding there was to be a discount given  
13 to Barclays off the value of the assets  
14 transferred; is that right?  
15 A. I did not have that knowledge.  
16 Q. Do you know if, when Mr. Kelly or  
17 people under his supervision prepared this  
18 schedule, they in fact did discount off of the  
19 marks shown on Lehman's books for those assets?  
20 A. I have no knowledge of that.  
21 Q. Do you have any knowledge of a  
22 discount in the range of \$5 billion being  
23 calculated before this schedule was put  
24 together?  
25 A. I have no knowledge of that.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 based on the marks.  
3 Q. How did you get that understanding?  
4 A. From the same source. Again, in the  
5 delivery of the schedule from Martin and Paolo.  
6 Q. Did they say something to you?  
7 A. I don't recall exactly what they said.  
8 Q. Yeah.  
9 A. But it was in the delivery of the  
10 schedule and what it represented as an estimate  
11 for purchased assets and assumed liabilities.  
12 Q. To your knowledge, sir, was any  
13 component of the business terms that were  
14 agreed -- withdrawn. To your knowledge, did any  
15 component of the business terms that were agreed  
16 include a discount off of those marks?  
17 A. I'm not aware of any discount off of  
18 the marks.  
19 Q. Did you ever have any discussion with  
20 anyone on the Lehman side of the table about a  
21 discount off of the marks?  
22 A. Not that I recall.  
23 Q. Was there any discussion that you ever  
24 heard about a bulk discount?  
25 A. Not that I recall.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Q. Have you ever had a discussion with  
3 Mr. Kelly about that?  
4 A. I have not.  
5 Q. Have you ever --  
6 A. That I recall.  
7 Q. -- had a discussion with Mr. Tonucci  
8 about that?  
9 A. I have not.  
10 Q. If you wanted to know the answer to  
11 those questions, who would you ask?  
12 MR. STERN: Objection to the form.  
13 A. I would ask Mr. Kelly and Mr. Tonucci.  
14 Q. Anyone else you think would have  
15 knowledge of that fact, whether the business  
16 terms included a \$5 billion discount to  
17 Barclays?  
18 A. I would ask the principal negotiators  
19 of the deal.  
20 Q. And that would be Dave Shafir and  
21 McGee?  
22 MR. STERN: Objection to the form.  
23 A. That's probably where I would start.  
24 Q. Who would you ask on the Barclays side  
25 of the table?  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. I would ask Rich Ricci.  
3 **Q. Anyone else?**  
4 A. I would ask Gerard LaRocco, I would  
5 ask Archie Cox, and I would ask Michael Klein,  
6 who was not a Barclays employee, but who was  
7 acting as an advisor.  
8 **Q. Now, are Mr. Ricci, LaRocco, Cox and**  
9 **Klein, would you describe them as the chief**  
10 **negotiators for Barclays?**  
11 A. I would describe the chief negotiators  
12 as Ricci, Cox and Klein.  
13 **Q. Do you know where Mr. Klein works**  
14 **today?**  
15 A. I do not.  
16 **Q. Do you know where he lives?**  
17 A. I do not.  
18 **Q. Do you know if anyone at Barclays has**  
19 **contact with him?**  
20 A. I don't know.  
21 **Q. What was his role? How did he come to**  
22 **be an advisor for Barclays, do you know?**  
23 A. I don't know how he became an advisor.  
24 He was acting as an advisor for Barclays.  
25 **Q. Did you have any discussions with him**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Nos. 132841, marked for identification, as  
3 of this date.)  
4 **Q. Mr. Berkenfeld, I have put before you**  
5 **what we have marked as Exhibit 20, a one-page**  
6 **document bearing document number 132841, lower**  
7 **right-hand corner, which appears to be an e-mail**  
8 **sent from Paolo Tonucci to Ian Lowitt and Martin**  
9 **Kelly and then an e-mail chain below that.**  
10 **Let me know when you've had a chance**  
11 **to look through and to read that document.**  
12 **MR. STERN: Please read it carefully.**  
13 I don't think it's a document you've seen  
14 before.  
15 **MR. GAFFEY: Thanks for answering my**  
16 **next question, Jack. Please don't do that.**  
17 **MR. STERN: I said I think.**  
18 A. I'm under oath.  
19 **Q. I understand that.**  
20 **(Document review.)**  
21 A. Okay.  
22 **Q. Okay. Have you ever seen that**  
23 **document before?**  
24 A. I have not.  
25 **Q. At any time?**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **at the time the drafting was going on of the**  
3 **Asset Purchase Agreement? By "him," I mean Mr.**  
4 **Klein.**  
5 A. I had discussions with Mr. Klein, but  
6 I don't recall any specific discussion around  
7 the terms of the Asset Purchase Agreement.  
8 **Q. And did you have any discussion around**  
9 **the terms of the Asset Purchase Agreement at the**  
10 **time with Mr. Ricci, Mr. LaRocco, Mr. Cox?**  
11 A. Not that I recall.  
12 **Q. Was Mr. Diamond -- would you**  
13 **characterize Mr. Diamond as one of the**  
14 **negotiators?**  
15 A. I don't know.  
16 **Q. Was he around the 32nd floor?**  
17 A. I don't have a recollection of him  
18 being there.  
19 **Q. Do you have a recollection of seeing**  
20 **Mr. Ricci, Mr. LaRocco, Mr. Cox and Mr. Klein?**  
21 A. Yes.  
22 **Q. Did you have any discussion with Mr.**  
23 **Diamond?**  
24 A. No.  
25 (Exhibit 20, a document bearing Bates  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. At any time.  
3 **Q. Now, you'll see in the bottom**  
4 **e-mail -- and so the record will make some sense**  
5 **when we read it later on, I'm going to read the**  
6 **e-mail into the record:**  
7 "Well, it took all night and lots of  
8 back and forth, but the deal is done and ready  
9 for the board. Final price did not change  
10 meaningfully. Approx a \$5b all in economic loss  
11 versus our marks and \$3.60b of resi assets left  
12 behind."  
13 **I'll stop reading there. Do you have**  
14 **any idea what Mr. Kelly was describing to Mr.**  
15 **Lowitt and Mr. Tonucci when he spoke about a 5**  
16 **billion all in economic loss versus our marks?**  
17 A. I do not.  
18 **Q. Have you ever heard before today that**  
19 **there may have been a \$5 billion all in economic**  
20 **loss versus Lehman marks --**  
21 A. I have not.  
22 **Q. -- in the asset purchase?**  
23 A. I have not.  
24 **Q. If you did understand that to be true,**  
25 **that there was a \$5 billion all in economic loss**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **versus the marks, would that be consistent with**  
3 **your understanding of the business terms?**  
4 MR. STERN: Objection to the form.  
5 A. Could you repeat the question?  
6 (Record read.)  
7 A. I don't think it would be  
8 inconsistent. I don't think it would be  
9 inconsistent.  
10 **Q. To your knowledge, in the drafting**  
11 **that you were involved in of the Asset Purchase**  
12 **Agreement, was there anything in that agreement**  
13 **that suggested there would be a \$5 billion**  
14 **discount off the actual value of the assets**  
15 **transferred?**  
16 MR. STERN: Objection to the form.  
17 A. There was, to my knowledge, nothing in  
18 the Asset Purchase Agreement that addressed a  
19 discount on assets.  
20 **Q. To your knowledge, were any of the**  
21 **lawyers involved in the drafting told anything**  
22 **about a \$5 billion overall economic loss to**  
23 **Lehman against the marks?**  
24 A. To my knowledge, none of the lawyers  
25 involved in the drafting were aware of any loss  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **take it, that you had an understanding of its**  
3 **terms, correct?**  
4 A. Correct.  
5 **Q. And normally I don't have to ask this**  
6 **question of a lawyer, but you read it carefully**  
7 **before you signed it? You read the whole thing?**  
8 A. Correct.  
9 **Q. Before, again, before we get to the**  
10 **terms, was there any concept, sir, was there any**  
11 **part of the structure of the transaction that**  
12 **contemplated giving a bulk discount to Barclays**  
13 **from the value of the assets transferred?**  
14 A. Not that I was aware of.  
15 **Q. To your knowledge, were any of the**  
16 **lawyers involved or other people involved in the**  
17 **drafting of the Asset Purchase Agreement given**  
18 **any indication there would be a bulk discount of**  
19 **some kind given to Barclays?**  
20 MR. STERN: Objection to the form.  
21 A. Not to my knowledge.  
22 **Q. And to your knowledge, sir, were any**  
23 **of the people responsible for making disclosures**  
24 **to the bankruptcy court told that there would be**  
25 **some kind of bulk discount given to Barclays?**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 on assets.  
3 **Q. To your knowledge, were any of the**  
4 **lawyers involved in the drafting told anything**  
5 **about a discount being given to Barclays off of**  
6 **the value of the assets being transferred?**  
7 A. Not to my knowledge.  
8 **Q. You understood that the terms of the**  
9 **transaction would have to be disclosed to the**  
10 **bankruptcy court, correct?**  
11 A. Correct.  
12 **Q. To your knowledge, was anyone who was**  
13 **responsible for making those disclosures to the**  
14 **bankruptcy court told that there was a discount**  
15 **to be given to Barclays off of the value of the**  
16 **assets transferred?**  
17 MR. STERN: Objection to the form.  
18 A. Not to my knowledge.  
19 **Q. When you say that giving a discount**  
20 **would not have been inconsistent with the**  
21 **agreement --**  
22 **Well, let's look at the agreement.**  
23 **You have the Asset Purchase Agreement in front**  
24 **of you. It's marked as Exhibit 1. When you**  
25 **signed the agreement, sir, you were confident, I**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 MR. STERN: Objection to the form.  
3 A. Not to my knowledge.  
4 **Q. I asked that latter question with**  
5 **respect to at any point during the bankruptcy**  
6 **proceedings from the original notification to**  
7 **the court there was an agreement through the**  
8 **point where the closing documents were filed**  
9 **with the court on September 22. That would be**  
10 **the period from the 16th through the 22nd of**  
11 **September.**  
12 A. Again, not to my knowledge.  
13 **Q. And to your knowledge, did anybody**  
14 **make any disclosure like that to the court after**  
15 **September 22?**  
16 MR. STERN: Objection to the form.  
17 A. I don't have knowledge of that.  
18 (Exhibit 21, a document bearing Bates  
19 Nos. 10309627, marked for identification, as  
20 of this date.)  
21 **Q. I have marked and put before you, Mr.**  
22 **Berkenfeld, as Exhibit 21 a one-page document**  
23 **bearing the number 10309627, which appears to be**  
24 **an e-mail at the top, an e-mail from Alex Kirk**  
25 **to Gerard Reilly and a list of other people, and**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 at the bottom of that is an e-mail from Reilly  
3 to Lowitt.  
4 And I'd ask you to take a look at the  
5 bottom of that. Let me know when you've had a  
6 chance to read through the items marked 1, 2 and  
7 3 in the body of the e-mail.  
8 A. I will.  
9 (Document review.)  
10 Q. Have you had a chance to read through  
11 the e-mail, sir?  
12 A. Yes, I have.  
13 Q. Have you ever seen that document  
14 before?  
15 A. I have not.  
16 Q. You've never seen it at any time?  
17 A. No, I have not.  
18 Q. Referring to the paragraph numbered 3  
19 in Mr. Reilly's e-mail to Mr. Lowitt, "Not clear  
20 on amount of block discount or how we make it  
21 happen. Defaulting on repo could be the best as  
22 discount could be taken from haircut."  
23 Actually -- period. Next sentence reads, "If  
24 not that, then we need to give business an  
25 allocation of block discount so they can mark  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 that was filed with the bankruptcy court, if  
3 part of the business terms were that Barclays  
4 was to be given a discount off the value of the  
5 long position transferred, would you have  
6 expected someone to tell you that?  
7 MR. STERN: Objection to the form.  
8 A. If there was a business deal to give a  
9 discount over then accurate valuations of  
10 positions as agreed to by the parties so that  
11 both parties said, this is the valuation in the  
12 current market, with everything that was going  
13 on Monday and Tuesday, as opposed to Friday and  
14 Thursday pre-bankruptcy, and everyone said these  
15 assets are worth X in today's market, given  
16 their size, given their illiquidity, what their  
17 fair market value is, they're worth X, and the  
18 deal is that we're going to sell them to you for  
19 something less than X so that you will be  
20 getting a discount off of the valuation at the  
21 time under the current market, and if that was  
22 part of the business deal agreed to by the  
23 parties, then I would have expected that to be  
24 disclosed to the lawyers who were preparing the  
25 document and the lawyers who were presenting to  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 down the books tonight." Do you see that?  
3 A. Yes, I do.  
4 Q. Did it ever come to your attention  
5 during the week of September 15 or 16 that there  
6 was going to be a markdown of books to give  
7 Barclays a discount?  
8 MR. STERN: Objection to the form.  
9 Q. You can answer, I think.  
10 A. Not that I recall.  
11 Q. As the signatory to the Asset Purchase  
12 Agreement, if it contemplated a block discount  
13 be given to Barclays, or any kind of discount  
14 being given to Barclays, after the value of the  
15 long position that was being transferred, would  
16 you have expected someone to tell you?  
17 MR. STERN: Objection to the form.  
18 A. I'm -- I'm not sure what these e-mails  
19 mean precisely, I've never seen them before, but  
20 I don't believe they mean what you are  
21 suggesting them to mean.  
22 Q. The question I asked was a little  
23 different. Not with reference to those two  
24 documents. The question I asked was whether, as  
25 the signatory to the Asset Purchase Agreement  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 the bankruptcy court.  
3 Q. And one of the lawyers involved in  
4 preparing the document was you?  
5 A. That is correct.  
6 Q. And you were the man who signed the  
7 document, correct?  
8 A. That is correct.  
9 Q. And did anyone ever make such a  
10 disclosure to you?  
11 A. No.  
12 Q. We can take those two e-mails and put  
13 them to the side. And if you would take a look,  
14 please, at the Asset Purchase Agreement marked  
15 as Exhibit 1.  
16 Now, the first place I would ask you  
17 to take a look, sir, in the asset agreement is  
18 at page 6, which contains the definition of  
19 "purchased assets." Tell me when you get there.  
20 A. Okay.  
21 Q. Okay, you with me? Now, the purchased  
22 assets as set out in the agreement on the  
23 16th -- we're going to cover some changes that  
24 came during the week, but right now I'm asking  
25 about what was in mind on the 16th -- referred  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 to in subsection D, "government securities,  
3 commercial paper, corporate debt, corporate  
4 equity, exchange traded derivatives and  
5 collateralized short-term agreements with a book  
6 value as of the date hereof approximately of \$70  
7 billion (collectively long positions)." You see  
8 that?  
9 A. Yes.  
10 Q. Is there a relation, sir, between the  
11 description of the long positions having a book  
12 value of approximately \$70 billion and the  
13 calculations on the financial statement --  
14 financial schedule we have marked as Exhibit 19?  
15 A. Yes, there is a relationship.  
16 Q. Okay. Describe that for me.  
17 A. The best way to describe it is that  
18 the schedule, Exhibit 19, was meant -- was not  
19 part of the Asset Purchase Agreement and, of  
20 course, could have been referred to in this  
21 section by the lawyers and incorporated into the  
22 purchase agreement. It was not.  
23 The best description is that it is  
24 meant as guidance of what was included in that  
25 very general description of 70 billion of, as  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 get to approximately 70 billion.  
3 Q. Well, if I only took 50 percent of  
4 them, I wouldn't deduct the whole amount, would  
5 I?  
6 A. The amount, I believe, on the schedule  
7 represents the 50 percent, not 100 percent.  
8 Q. So the 2.7, it may actually be a  
9 number more like 5.4?  
10 A. I believe that is correct. I don't  
11 specifically recall.  
12 Q. Okay. If the 2.7 is 50 percent of the  
13 resis, of the residential real estate mortgage  
14 securities, then isn't Subsection E already  
15 accounted for in the schedule? Maybe I'm not  
16 understanding your answer.  
17 MR. STERN: Objection to the form.  
18 A. There is a gap between 70 billion and  
19 72.65 --  
20 Q. Uh-huh.  
21 A. -- that is approximately the 2.7 that  
22 is listed on the mortgages. The 2.7 that's  
23 listed on the mortgages is not in subsection D  
24 of Purchased Assets.  
25 Q. Uh-huh.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 defined, long positions in that section of the  
3 purchase agreement.  
4 Q. So where the schedule calculates  
5 assets, adjusted total assets at 72.65 billion,  
6 that's put at approximately 70 billion in the  
7 agreement?  
8 A. There's also Section E, which is 50  
9 percent of each position in the residential real  
10 estate mortgage securities. So there's also a  
11 mortgage item here --  
12 Q. Okay.  
13 A. -- that's not in the list in D. So,  
14 government securities, commercial paper, it  
15 skips to corporate debt, corporate equity,  
16 derivatives, collateralized short-term  
17 agreements.  
18 Q. Right.  
19 A. No mortgages. Mortgages are mentioned  
20 in Section E.  
21 Q. Okay. So if I cut the mortgage piece  
22 by half, I get closer to 70; is that what you're  
23 telling me? I'm in 19, right?  
24 A. No, if you deduct the number of  
25 mortgages, 2.7, on the schedule from 72.65, you  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. It's referred to in Subsection E of  
3 Purchased Assets.  
4 Q. Well, again, sir, just -- and this is  
5 my math skills, I guess, but if I added 2.7 back  
6 into the asset side of schedule 19 to account  
7 for the other 50 percent on mortgages, I come up  
8 with 65.4 as a total for those assets, which  
9 would give you an adjusted total of 75.4, or are  
10 we missing each other still?  
11 MR. STERN: Objection to the form.  
12 A. I believe we're missing each other  
13 still.  
14 Q. Okay.  
15 A. If you take all of the items listed in  
16 Section D --  
17 Q. Uh-huh.  
18 A. -- they approximate 70 billion. Just  
19 add them up.  
20 Q. Got it. Now I understand what you're  
21 saying.  
22 A. 41.1, 4.9, 8.8, 4.5, .7, 10.  
23 Q. All right. Got it. Thank you.  
24 Now, so what that means is, once  
25 you've made that adjustment for the items D and  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **E that you just discussed to me, the so-called**  
3 **long positions add up to the 70 that this**  
4 **schedule marked as Exhibit 19 would show?**

5 A. To be precise, you also need to  
6 include A, cash.

7 **Q. Right, because you've got that \$700**  
8 **million cash item on here, yes? On the**  
9 **schedule?**

10 A. I would characterize Exhibit 19, the  
11 schedule, as being guidance for what was being  
12 referred to in words and not cross-referenced to  
13 a schedule, not with the schedule incorporated,  
14 in the definition of "purchased assets" under  
15 Section A, D and E.

16 **Q. Okay. And is it safe for me -- well,**  
17 **let me ask you this: Covering a little bit of**  
18 **what we talked about this morning, you -- it's**  
19 **correct that you do not have any knowledge about**  
20 **the process by which this schedule marked as**  
21 **Exhibit 19 was assembled?**

22 A. I do not have any knowledge of the  
23 process that our finance staff went through to  
24 come up with these numbers.

25 **Q. Okay.**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 A. I have no knowledge whether these  
3 represent all of those positions that were on  
4 the books and records or how the valuations were  
5 calculated. I don't have any information about  
6 the process.

7 **Q. Nor do you have any information about**  
8 **whether this accurately reflects what's shown as**  
9 **the marks on the books?**

10 A. I don't have any information or  
11 knowledge about how these numbers relate to the  
12 marks on the books as of any particular date,  
13 whether that was close of business on Friday or  
14 close of business on Monday or Tuesday, as  
15 markets were moving very significantly and there  
16 was a tremendous amount of volatility.

17 **Q. And other than the -- well, if you**  
18 **have Exhibit 18 there, it's the slightly earlier**  
19 **version of the schedule, it's the one with the**  
20 **time of 10:09. Okay? You recall being given**  
21 **the schedule marked as Exhibit 18, that's the**  
22 **10:09 A.M. schedule, by Kelly or Tonucci,**  
23 **correct?**

24 A. Correct.

25 **Q. Okay. And then at or sometime**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **slightly after -- or sometime after 11:18 A.M.,**  
3 **you're given the modified version of that**  
4 **schedule which we have marked as Exhibit 19 and**  
5 **which you signed off on as final, correct?**

6 A. Correct.

7 **Q. Was there any explanation given to you**  
8 **for the modification of the schedule?**

9 A. Not that I recall.

10 **Q. Did you ask for one?**

11 A. No, I don't recall.

12 **Q. So I'm clear on what your recollection**  
13 **is or isn't, are you saying you don't recall one**  
14 **way or the other whether you had the discussion**  
15 **or you don't recall, you don't think you had the**  
16 **discussion?**

17 MR. STERN: Objection to the form.

18 A. I think the best answer is I don't  
19 think I had a discussion. I didn't see the  
20 differences between the two schedules as  
21 significant. One was 73.15. The other was  
22 72.65. On a percentage basis, it was not a  
23 significant difference.

24 **Q. I'm just being suggestive with this**  
25 **question. It's not based on anything anybody**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 **else has told me, but you've got a lot going on,**  
3 **you're doing the deal, they're giving you the**  
4 **schedule the calculations are going to be based**  
5 **on, and in a space of about 45 minutes, it's**  
6 **changed.**

7 **Do you suggest to anyone in sum or**  
8 **substance, are you guys going to get me a final**  
9 **one? I mean, are you concerned with the fact**  
10 **that it's changing at that pace?**

11 A. I wanted to document which was the  
12 final schedule to provide the guidance.

13 **Q. Right.**

14 A. So I wouldn't have dated it and put  
15 "final" on it and initialed it unless there was  
16 a desire on my part to sort of put some kind of  
17 finality --

18 **Q. Okay.**

19 A. -- at that point in time --

20 **Q. Got it.**

21 A. -- on what this estimate was.

22 **Q. Would you turn, please, to page 35 of**  
23 **the agreement. That will put us in Article 9,**  
24 **in Section 9.1(C).**

25 MR. STERN: Page 35?

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 MR. GAFFEY: Page 35 of Exhibit 1.  
3 MR. STERN: And which article? We're  
4 looking at 9.1(C)?  
5 MR. GAFFEY: Yes.  
6 **Q. I just want to direct your**  
7 **attention -- I'm going to come back to the**  
8 **section with some questions about its terms, but**  
9 **I direct your attention, sir, within 9.1(C),**  
10 **which is on page 35, there's a reference**  
11 **starting four lines down to "the financial**  
12 **scheduled delivered to purchaser on September**  
13 **16." With me?**  
14 A. Uh-huh.  
15 **Q. That's a reference to, "The financial**  
16 **schedule delivered to purchaser on September 16,**  
17 **2008, and initialed by an officer of each of**  
18 **Holdings and Purchaser," and then the liability**  
19 **to which it refers is defined. Do you see that**  
20 **sentence there?**  
21 A. Yes, I do.  
22 **Q. All right. Now, is the schedule that**  
23 **we've marked as Exhibit 19 the schedule to which**  
24 **9.1(C) refers?**  
25 A. Yes, I believe so.  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Q. I have.**  
3 A. But I do know as a lawyer and as an  
4 M&A lawyer by early training, that with all the  
5 drafts going on it would have been very easy to  
6 refer to the same schedule in the purchased  
7 assets or the assumed liabilities or other  
8 sections of the agreement.  
9 **Q. Right.**  
10 A. And again, this is consistent with my  
11 characterization of this as guidance.  
12 **Q. "This" being this schedule?**  
13 A. The schedule, excuse me, Exhibit 9.  
14 Let me be more precise. It's guidance for what  
15 was meant in the Asset and Liability sections of  
16 the Purchase Agreement, but not to be thought of  
17 as definitive enough to be included as part of a  
18 schedule to the agreement that said it's these  
19 assets and these liabilities that are being  
20 transferred over.  
21 MR. STERN: You said Exhibit 9. You  
22 meant Exhibit 19?  
23 THE WITNESS: 19. I'm sorry. Exhibit  
24 19.  
25 **Q. Now, so without regard to the exhibit,**  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Q. Okay. Given the express reference to**  
3 **that schedule in 9.1(C), which has to do with**  
4 **certain compensation to transferred employees**  
5 **issues, is there a reason the schedule was not**  
6 **attached to the agreement that was filed with**  
7 **the court?**  
8 MR. STERN: Objection to the form.  
9 A. I don't remember any discussion among  
10 all of the lawyers that said we're not going to  
11 attach the schedule for these reasons.  
12 **Q. Okay.**  
13 A. I think that each lawyer might have  
14 had different views on why it wasn't attached.  
15 **Q. Uh-huh.**  
16 A. I don't recall a consensus, should we  
17 attach it or not.  
18 **Q. Okay.**  
19 A. As far as I know, this is only  
20 reference to the agreement.  
21 **Q. All right.**  
22 A. In the agreement to the schedule.  
23 **Q. It is. I agree with you there.**  
24 A. I haven't reread the agreement, so I  
25 don't remember.  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **the free-standing -- to the schedule, the Asset**  
3 **Purchase Agreement tells the reader that**  
4 **approximately \$70 billion book value of the long**  
5 **position is being transferred, correct? That's**  
6 **what the reader should rely on for the value of**  
7 **the deal, \$70 billion in long position, yes?**  
8 A. The purchase agreement says that  
9 what's being transferred over is approximately  
10 70 billion of book value.  
11 **Q. Uh-huh.**  
12 A. As of that date.  
13 **Q. Right.**  
14 A. Of long positions in a variety of  
15 assets.  
16 **Q. Now, under the agreement, Barclays was**  
17 **going to, I think you said before, and we've all**  
18 **read the agreement, was going to purchase the**  
19 **assets by paying a certain amount in cash and**  
20 **then assume certain liabilities, correct?**  
21 A. I don't think I said it that way. I  
22 said that there were certain assets that were  
23 being purchased for cash, including real estate  
24 and goodwill or franchise value.  
25 **Q. Right.**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. And then there was going to be a  
3 transfer over of assets and liabilities.  
4 Q. Okay. Now, with respect to the  
5 transfer of the assets, was there ever any  
6 discussion of a so-called matched book, you  
7 know, there was a matched book concept in this  
8 deal that the liabilities that Barclays assumed  
9 in connection with the transferred assets would  
10 roughly equal the transferred assets?  
11 MR. STERN: Objection to the form.  
12 A. I don't recall any specific  
13 discussions around a matched book.  
14 Q. What I want to know is whether that  
15 term was used, "matched book," to your  
16 knowledge.  
17 A. To my recollection, I don't remember  
18 if the term was used or not.  
19 Q. Okay. Now, if you would turn, please,  
20 Mr. Berkenfeld, to page 11. It's Article 2,  
21 entitled Purchase and Sale of Assets, Assumption  
22 of Liabilities?  
23 A. Yes.  
24 Q. Now, one of the agreements that  
25 Barclays made in this contract was set out in  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Q. And in Article 9(B), there is a  
3 reference -- there's a description and a  
4 discussion of severance payments and benefits  
5 that Barclays would give to terminated  
6 transferred employees. By "transferred  
7 employees," I mean people who meant from Lehman  
8 to Barclays. Is that right?  
9 A. 9.1(B), you said?  
10 Q. 9.1(B).  
11 A. Yes.  
12 Q. Put in short form, 9.1(B) deals with  
13 severance benefits, yes?  
14 A. Yes.  
15 Q. And 9.1(C) deals with bonuses?  
16 A. I would have to read 9.1(C) again.  
17 Q. Take your time and read it.  
18 (Document review.)  
19 A. Okay.  
20 Q. Okay. Now, you've had a chance to  
21 look through the language of 9.1(C)?  
22 A. Yes.  
23 Q. My question was 9.1(C) deals with  
24 bonuses, correct?  
25 A. That is correct.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Section 2.3 entitled Assumption of Liabilities.  
3 Do you see that?  
4 A. Yes.  
5 Q. And there are in subsections "A"  
6 through "I" descriptions of the liabilities that  
7 Barclays would assume, correct?  
8 A. Correct.  
9 Q. And the assumption of those  
10 liabilities, to your understanding as the  
11 signatory to the agreement, was part of the  
12 consideration that Barclays gave for the assets  
13 purchased, correct?  
14 A. Yes.  
15 Q. And among the liabilities that  
16 Barclays agreed to assume were all liabilities  
17 assumed under Article 9, and I'm referring there  
18 to Section 2.3, subsection C, you with me?  
19 A. Yes.  
20 Q. Okay. And Article 9 brings us back to  
21 page --  
22 MR. STERN: 34.  
23 Q. -- 34, entitled Employees and Employee  
24 Benefits, yes?  
25 A. Yes.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Q. Okay. And as between 9.1(B) and  
3 9.1(C), the only one that refers to the  
4 schedule, the financial schedule, the one we've  
5 marked as Exhibit 19, is 9.1(C), correct?  
6 A. Correct.  
7 Q. So, using the logic that or the  
8 reasoning that you gave to me with respect to  
9 the definitions of "purchased assets" and the --  
10 and not mentioning the schedule there, would you  
11 agree with me, sir, that that must mean that the  
12 financial schedule we have marked as Exhibit 19  
13 bears no relation to the requirements of Section  
14 9.1(B) regarding severance?  
15 MR. STERN: Objection to the form.  
16 A. No, I don't agree with that.  
17 Q. Okay. So not referring to it in the  
18 definition of "purchased assets" has meaning,  
19 but not referring to it in Section 9.1(B)  
20 doesn't -- requires a different analysis? Could  
21 you explain that?  
22 MR. STERN: Objection to the form.  
23 A. I think you have to look at the words  
24 very carefully. Purchaser shall or shall cause  
25 it subs to pay each transferred employee an  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2       annual bonus. In respect of 2008, that in the  
3       aggregate are equal in amount to 100 percent of  
4       the bonus pool amounts. Accrued and respect  
5       amounts payable in respect of compensation and  
6       reflected, reflected on the financial schedule  
7       delivered to.  
8       **Q. Uh-huh. And the amount --**  
9       A. Not set forth on the financial  
10      schedule, not in the amount specified, but  
11      reflected. So I believe that you are reading  
12      too much into the schedule to say that comp  
13      means bonuses.  
14      **Q. How much time did you spend when you**  
15      **were drafting this document deliberately**  
16      **choosing the precise verb "reflected" to make**  
17      **sure that that was what was meant by that**  
18      **provision, sir?**  
19      MR. STERN: Objection to the form.  
20      **Q. Did you spend a lot of time on that?**  
21      MR. STERN: Objection to the form.  
22      **Q. Is that the verb that M&A lawyers use**  
23      **to mean the schedule might mean less than it**  
24      **says?**  
25      MR. STERN: Objection to the form.  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2       of the point I made earlier that the schedule  
3       was meant as guidance. It was referred to in  
4       the section.  
5       **Q. Right.**  
6       A. But it was never attached to the  
7       agreement, and even in this provision -- let me  
8       finish -- could have been attached to the  
9       agreement or the number itself could have been  
10      put in the agreement, that wouldn't have taken  
11      too much difficulty, instead of writing all  
12      these extra words that say in the financial  
13      schedule or so and so. They could have just, if  
14      your interpretation was correct, said 2 billion.  
15      **Q. All right. So --**  
16      A. So that was not done. This schedule,  
17      again, was meant as guidance. It had  
18      significance because in a very short timeframe  
19      we were trying to pull a deal together, and  
20      there were provisions in this agreement that  
21      didn't have schedules attached where an  
22      agreement customarily would say these are  
23      specifically the assets you are buying, these  
24      are specifically the liabilities you are  
25      assuming.  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2       You can answer if you remember.  
3       **Q. Do you remember? It's not a remember**  
4       **question. It's a drafting technique question.**  
5       A. Which question? I think you asked  
6       four or five.  
7       **Q. How deliberate was your choice of the**  
8       **verb "reflecting" --**  
9       MR. STERN: Objection to the --  
10      **Q. -- when you agreed to it when you**  
11      **signed the Asset Purchase Agreement, as opposed**  
12      **to the other verbs that you pointed out are not**  
13      **used here?**  
14      A. I don't believe I choose the verb  
15      "reflecting."  
16      **Q. Do you know who did choose the verb**  
17      **"reflecting"?**  
18      A. I don't know.  
19      **Q. So is your assessment of the meaning**  
20      **of the verb "reflecting" a sort of retroactive**  
21      **assessment? It wasn't one you were involved in**  
22      **at the time of the drafting of the agreement; is**  
23      **that right?**  
24      MR. STERN: Object to the form.  
25      A. I think that's a mischaracterization  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2       **Q. Right.**  
3       A. As an unnecessary and gratuitous  
4       remark, you can compare this purchase agreement  
5       to many other purchase agreements done in a  
6       normal timeframe that would have attached to  
7       them --  
8       **Q. A schedule?**  
9       A. -- hundreds of pages of schedules that  
10      would list every piece of furniture and  
11      equipment that might go on a particular  
12      transaction.  
13      **Q. Okay.**  
14      A. So I'm answering your question beyond  
15      where I think you asked it, but to kind of maybe  
16      take a step forward instead of going around it.  
17      **Q. No, I appreciate that.**  
18      A. We could have --  
19      Please let me finish.  
20      **Q. Sure.**  
21      A. We could have put specific numbers in  
22      this agreement. We could have attached specific  
23      schedules to this agreement. Even this  
24      reference to the schedule is done in a fairly  
25      imprecise way --  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Q. Uh-huh.**

3 A. -- where it could have set forth as  
4 schedule X, right? And that wasn't done either.

5 So the provision is -- receives  
6 guidance from the schedule, but the provision  
7 wasn't meant to be a specific attachment or  
8 cross-reference to a number on a particular  
9 schedule.

10 **Q. One other reason you might not have**  
11 **attached it is you didn't want it filed in the**  
12 **court; that's another possibility, isn't it?**

13 MR. STERN: Objection to the form.

14 **Q. That's just -- I'm speculating too,**  
15 **but that is another reason you might choose not**  
16 **to put it the agreement?**

17 A. I have no knowledge of that.

18 **Q. So, if I have this guidance point**  
19 **right, because it's not referred to at all in**  
20 **the "purchased assets" definition, it's**  
21 **guidance. Because it's only referred to but not**  
22 **attached in 9.1(C), it's also guidance. In**  
23 **order to be governing, it has to be attached, is**  
24 **that --**

25 MR. STERN: Objection to the form.

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD

2 **Q. -- correct?**

3 A. I would rephrase it again as saying  
4 you have a schedule here with some very rounded  
5 numbers, including 2.0 for comp.

6 **Q. Uh-huh.**

7 A. I don't know firsthand, but I would  
8 doubt that accrued bonuses at that point in time  
9 happened to just be exactly --

10 **Q. 2 billion?**

11 A. -- 2 billion.

12 So I believe that the schedule was  
13 again meant as guidance to say that there were  
14 approximately 70 billion of assets of those type  
15 of assets plus cash and mortgages and  
16 approximately another number of assumed  
17 liabilities -- we haven't looked at that section  
18 of the agreement yet -- and approximately this  
19 much of comp that is referred to in Article 9.  
20 The liability that Barclays was taking on was  
21 the entire liability of Section 9, which include  
22 bonuses and severance.

23 MR. STERN: On Exhibit 19, have you  
24 located a copy that was initialed by --

25 MR. GAFFEY: Jack, why don't we wait  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 until we take my deposition. Ask your  
3 client. Don't take my time with this. If  
4 you want to take him out and coach him, go  
5 ahead, but don't do it on the record. It's  
6 just wasting everybody's time.

7 MR. STERN: I would just ask because  
8 we have not located a copy. I don't know if  
9 you have one that was initialed by anybody  
10 from Barclays.

11 MR. GAFFEY: I have shown him the one  
12 with his initials, okay? When you want to  
13 have a discussion about document production,  
14 let's do it in more fruitful time. You know  
15 that's improper.

16 **Q. Do you want to change any of your**  
17 **answer about that being the governing schedule?**

18 MR. STERN: This doesn't relate --

19 MR. GAFFEY: Let me finish. I want to  
20 ask the witness a question.

21 **Q. Is there any part of your answer you**  
22 **want to change based on what Mr. Stern just**  
23 **said? Any of your answers?**

24 MR. STERN: I'm going to instruct you  
25 not to answer. That's improper.

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD

2 MR. GAFFEY: So is coaching your  
3 witness. Don't do it, Jack. Come on.

4 MR. STERN: I'm asking you --

5 MR. GAFFEY: You know better than  
6 that.

7 MR. STERN: -- if you have a different  
8 version of this.

9 MR. GAFFEY: If I have a different  
10 version, I'll get to it. We're not done yet  
11 today, are we?

12 MR. STERN: No, we're not.

13 MR. GAFFEY: And if it's not his  
14 initials on it, I might show it to --

15 MR. STERN: There's no reason to --  
16 I'm not coaching the witness.

17 MR. GAFFEY: Of course there is.  
18 You're blatantly violating the rules by  
19 coaching the witness.

20 MR. STERN: I'm not coaching the  
21 witness.

22 MR. GAFFEY: You know what you're  
23 doing. Don't do it.

24 MR. STERN: I'm asking about the  
25 exhibit at a time when we're focusing on the  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       exhibit.  
3       MR. GAFFEY: Are you done?  
4       MR. STERN: I am.  
5       **Q. Now, back to your testimony, the**  
6       **definition of "purchased assets" uses the word**  
7       **"approximately," do you recall that, the**  
8       **definition of the long position?**  
9       MR. STERN: What section are you  
10      referring to?  
11      MR. GAFFEY: I'm in section --  
12      MR. STERN: Definition of Purchased  
13      Assets?  
14      MR. GAFFEY: Yeah, Definition of  
15      Purchased Assets, Section 1(B).  
16      **Q. That does use the word**  
17      **"approximately," right?**  
18      A. Yes.  
19      **Q. But the reference in 9.1(C) to the**  
20      **schedule does not use the word "approximately,"**  
21      **does it? Is that a deliberate choice?**  
22      MR. STERN: We're on page 35?  
23      MR. GAFFEY: Yes.  
24      A. It was not a deliberate choice by me.  
25      **Q. Was it a deliberate choice by anybody?**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       **the comp accrual on Lehman's books?**  
3       A. I have not.  
4       **Q. Have you ever seen a schedule or**  
5       **worksheet prepared by Mr. Kelly or anyone under**  
6       **his supervision that reflects an adjustment to**  
7       **the values shown on the assets side of the**  
8       **financial schedule we have marked as Exhibit 19?**  
9       A. I'm sorry. Can you read back that  
10      question, please?  
11      (Record read.)  
12      A. I have not.  
13      **Q. Did anyone ever suggest to you in sum**  
14      **or substance, sir, when you saw the financial**  
15      **schedule marked as Exhibit 19 that the comp and**  
16      **cure numbers were just plug numbers to make it**  
17      **balanced?**  
18      A. To my recollection, no one had ever  
19      suggested that to me.  
20      **Q. Was it the contemplation, was it part**  
21      **of the structure of the transaction that**  
22      **Barclays was in fact going to undertake to**  
23      **assume liabilities in roughly the amounts guided**  
24      **by the schedule marked as Exhibit 19?**  
25      A. I believe it was the understanding  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       A. I wouldn't know.  
3       **Q. Okay. Do you know if the comp number**  
4       **on 19 was increased beyond the actual accrual**  
5       **shown on Lehman's books for comp?**  
6       A. I have no knowledge of how the number  
7       itself was arrived at.  
8       MR. GAFFEY: Jack, could you put  
9       Exhibit 20 back in front of Mr. Berkenfeld.  
10      MR. STERN: Sure.  
11      **Q. Exhibit 20 is Mr. Kelly's e-mail to**  
12      **Mr. Lowitt dated September 16, and there's a**  
13      **reference in it, sir, to "an extra 1 billion of**  
14      **comp beyond our accrual."**  
15      That's why I asked the question. Not  
16      because it's in this e-mail, that's why I  
17      thought to ask the question. You have no  
18      knowledge one way or the other about whether  
19      that 2 billion is actually \$1 billion of comp  
20      beyond Lehman's accrual?  
21      A. I have no knowledge one way or the  
22      other.  
23      **Q. Have you seen any work sheets prepared**  
24      **by Mr. Kelly or someone under his supervision**  
25      **that show a \$1 billion transaction adjustment to**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       that Barclays would assume liabilities that were  
3       at the time estimated roughly to be in this  
4       amount.  
5       **Q. Okay. And that the liabilities that**  
6       **Barclays -- I don't want to hold you to the**  
7       **exact cent of the number, that level of**  
8       **specificity, but the liability that Barclays**  
9       **would assume would be roughly in the**  
10      **neighborhood of the cure and comp -- for cure**  
11      **and comp would be roughly in the neighborhood of**  
12      **the cure and comp amounts shown on the financial**  
13      **schedule as guidance?**  
14      MR. STERN: Objection to the form.  
15      A. As of the date of this agreement, I  
16      believe it was the understanding that there were  
17      liabilities being assumed by Barclays, some of  
18      which could be estimated with more precision  
19      than others. Certain of the securities  
20      positions, for instance, could be estimated with  
21      more precision, but that the obligations of  
22      Barclays were going to be set forth in the  
23      Purchase Agreement, not determined by the  
24      schedule.  
25      **Q. Did the obligation to assume by**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Barclays bear any relation at all to what was**  
3 **set out in the schedule?**  
4 MR. STERN: Objection to the form.  
5 A. I believe that the agreement refers to  
6 assumed liabilities --  
7 **Q. Uh-huh.**  
8 A. -- of securities positions of  
9 approximately 69 billion.  
10 **Q. Right.**  
11 A. Which is the number that --  
12 **Q. That's the short position that we see**  
13 **in the agreement?**  
14 A. -- is reflected in the exhibit.  
15 **Q. Right. What about the numbers**  
16 **reflected in the exhibit for liabilities for**  
17 **cure and comp, are they roughly -- was that also**  
18 **guidance as to roughly the levels they would be**  
19 **at?**  
20 A. It was -- under the agreement the  
21 amount to be paid in comp refers to the  
22 schedule, and that was rough guidance of what  
23 would be paid.  
24 **Q. Okay.**  
25 A. With regard to cure payments, I think  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Approximately.  
3 **Q. I mean, there's a difference between**  
4 **18 and 19 because of the change in the numbers,**  
5 **but internally, the assets are supposed to match**  
6 **the liabilities as part of the structure of the**  
7 **deal, correct?**  
8 MR. STERN: Objection to the form.  
9 A. The schedule indicates assets and  
10 liabilities that are the same.  
11 **Q. Okay. Was that a feature of the**  
12 **structure of the transaction?**  
13 MR. STERN: Objection to the form.  
14 A. Again, the schedule -- I think that's  
15 reading too much into the schedule as providing  
16 guidance to what certain of the provisions of  
17 the agreement meant. I would like to the Asset  
18 Purchase Agreement as what the deal was, we  
19 covered that earlier in my testimony, as opposed  
20 to the schedule being the deal. The agreement  
21 was the deal. The schedule was not even part of  
22 it.  
23 But it was something that the guidance  
24 we thought would be helpful and we did document  
25 it as a final schedule.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 it's covered separately by the agreement.  
3 **Q. It's a little different because of the**  
4 **provisions to cure.**  
5 MR. STERN: I think he needs to finish  
6 his answer. I don't think he finished his  
7 answer.  
8 **Q. Did you finish your answer? Sorry.**  
9 A. I believe the cure payments were  
10 covered separately by the agreement in a  
11 separate provision.  
12 **Q. Right.**  
13 A. That does not make reference to the  
14 schedule.  
15 MR. STERN: Can we take another short  
16 break?  
17 MR. GAFFEY: Sure.  
18 (Recess; Time Noted: 11:42 A.M.)  
19 (Time Noted: 11:49 A.M.)  
20 BY MR. GAFFEY:  
21 **Q. Going back to this concept, Mr.**  
22 **Berkenfeld, of the schedule being guidance, one**  
23 **aspect of the schedule, though, is that they**  
24 **balance; assets equal liabilities on these**  
25 **financial schedules, correct?**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. Quite apart from the schedule, let's**  
3 **push them to the side. I want to get your**  
4 **understanding of the deal that you signed.**  
5 **Was the deal structured in a way -- on**  
6 **the 16th when you signed the deal, was it**  
7 **contemplated as part of that deal that either --**  
8 **that Lehman would enjoy a net benefit, a gain**  
9 **from the deal, or Barclays would, or it would be**  
10 **a wash?**  
11 A. There were certain -- there was  
12 consideration being paid for assets of Lehman  
13 Brothers, for the real estate, for the going  
14 concern.  
15 Your question was, was that gain? I  
16 don't know. I imagine at some point in time we  
17 thought that the franchise of Lehman Brothers  
18 was worth more than \$250 million and the real  
19 estate may have been worth more than what was  
20 ultimately paid for it, too.  
21 So there was that component of the  
22 transaction, and there were assets that were  
23 being moved over as employees were being moved  
24 over who managed those positions, and there was  
25 an estimated amount of liabilities in the form  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 of both security positions that moved over again  
3 that to some extent had relationship with the  
4 assets, and there were a bunch of other  
5 liabilities that Barclays was assuming in the  
6 transaction and that were no longer going to be  
7 liabilities of Lehman Brothers of the estate of  
8 the bankrupt company, including liabilities for  
9 compensating employees that they were hiring  
10 through the whole year, not from closing on, and  
11 for severance of employees who otherwise would  
12 have been without severance and would have been  
13 terminated by the estate without any, you know,  
14 benefits, healthcare, worker's comp, T & E that  
15 they were owed. It was that simple.  
16       So it was a big value to being able to  
17 take all those employees off of the estate's  
18 responsibility and onto Barclays, and then there  
19 were a number of things like accounts payable  
20 and contracts that were going to be assumed that  
21 had liabilities associated with them. And that  
22 was my understanding of the transaction.  
23       **Q. Was it your understanding of the**  
24 **transaction that, at the end of the transaction**  
25 **that you agreed to, Barclays would enjoy a gain**  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 positive and valuable transaction to Barclays,  
3 but it depended on what happened afterwards and  
4 it depended on their ability to retain the  
5 employees that they were hiring and the  
6 franchise value of those employees.  
7       **Q. I'm not actually asking about the**  
8 **long-term value. If it operates what it bought**  
9 **well, it makes money in the long-term, great.**  
10 **I'm asking whether it was -- whether the**  
11 **transaction was, in your mind when you signed**  
12 **it, was it structured so that Barclays would**  
13 **enjoy a gain because of the excess of the fair**  
14 **value of the net assets it acquired over the**  
15 **consideration that Barclays paid?**  
16       MR. STERN: Objection to the form.  
17       **Q. Not whether it was going to long-term**  
18 **be successful operating the business. On**  
19 **acquisition.**  
20       MR. STERN: Objection to the form.  
21       A. My understanding of the transaction is  
22 that, on acquisition, as reflected in the Asset  
23 Purchase Agreement, it was not intended that  
24 Barclays would have an immediate excess value in  
25 the assets that they were bringing over.  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **based on the excess of the fair value of net**  
3 **assets acquired over the consideration that it**  
4 **paid?**  
5       A. I did not have an understanding at the  
6 time that the transaction was signed or as it  
7 evolved post-signing into the closing that there  
8 was any embedded gain on the part of Barclays  
9 around specific positions.  
10       I would like to clarify that I  
11 certainly thought that over time they would  
12 realize more than \$250 million of value for the  
13 Lehman Brothers franchise. I worked there for a  
14 long time. I believed that the franchise and  
15 all the employees it made up was worth something  
16 more than \$250 million in a normal market, but  
17 there was no normal market and that value would  
18 have become zero very quickly if this  
19 transaction hadn't happened.  
20       So you specifically said, you know,  
21 gain and value.  
22       **Q. Gain on acquisition is actually what I**  
23 **said.**  
24       A. Gain on acquisition. And so my answer  
25 is that this had a potential to be a very  
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1       HIGHLY CONFIDENTIAL - S. BERKENFELD  
2       **Q. Okay. Was that intended in any part**  
3 **of the deal as it evolved between the 16th of**  
4 **September and when it closed on the 22nd?**  
5       MR. STERN: Objection to the form.  
6       A. To my knowledge, it was not.  
7       **Q. Now, the Asset Purchase Agreement --**  
8 **and I'm at page 12. I want to get to the**  
9 **definition of "short positions," which is**  
10 **Section 2.3(i). You with me?**  
11       A. Yes.  
12       **Q. Okay. And have you had a chance to**  
13 **read through that, please?**  
14       A. Yes.  
15       **Q. Okay. And that puts the short**  
16 **positions, that would be the liabilities side,**  
17 **at 69 billion, approximately 69 billion, yes?**  
18       A. That's correct.  
19       **Q. Okay. And then I ask you to take a**  
20 **look at the -- I want to take a look, please, at**  
21 **Section 3.3, which is found at page 14 and is**  
22 **entitled Adjustment to Cash Amount.**  
23       Let me know when you've had enough  
24 time to familiarize, you know, remind yourself  
25 of the terms of Section 3.3.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Okay.  
3 **Q. Okay. Now, in substance, sir, Section**  
4 **3.3 provided that if the value of the long**  
5 **position increased over the 12 months after the**  
6 **deal, that Lehman could enjoy the benefit of**  
7 **that, the upside of that up to a cap of \$750**  
8 **million. Is that more or less the essence of**  
9 **the provision?**  
10 A. The essence of the provision is that  
11 there was a profit-sharing --  
12 **Q. Uh-huh.**  
13 A. -- provision so that if the value of  
14 the long positions had changed over the -- or  
15 the value of the short positions, but so that  
16 the combination of the positions transferred  
17 over led to a gain of more than a certain  
18 amount --  
19 **Q. Right.**  
20 A. -- actually any amount, they would be  
21 transferred over to the seller and it was  
22 capped, yes.  
23 **Q. Why was that provision originally**  
24 **included in the agreement you signed on**  
25 **September 16?**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Because there was an appreciation for  
3 the volatility of the market, both after the  
4 Lehman bankruptcy and the week before, too, very  
5 volatile situation, and the amount of risk and  
6 potentially opportunity in the positions and an  
7 expectation that the positions could move  
8 significantly, and that it would be difficult to  
9 put any sort of stake in the ground and say  
10 these positions are worth this and when they're  
11 realized that's what you'll get from them  
12 because of that volatility.  
13 So that if it turned out that there  
14 was more value to the positions than had been  
15 estimated at the time, that there was an  
16 opportunity for the purchaser -- excuse me, for  
17 the seller to recapture some of that value.  
18 **Q. Now, ultimately, and we'll cover some**  
19 **of the details of this in a while, but**  
20 **ultimately that Adjustment to Cash Amount**  
21 **provision is stricken from the agreement by an**  
22 **amendment, correct?**  
23 A. Ultimately, there were a series of  
24 amendments when people had somewhat more time  
25 that dramatically changed a lot of this

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 agreement.  
3 **Q. Now, but going back to the agreement**  
4 **as it looked on the 16th, if you take the real**  
5 **estate and put it to the side, okay? X amount**  
6 **is being paid for three buildings. Then you're**  
7 **left with a \$70 million long position being**  
8 **transferred to Barclays, correct, approximately?**  
9 A. Correct.  
10 **Q. And a \$250 million cash payment being**  
11 **made by Barclays to Lehman, correct?**  
12 A. Correct.  
13 **Q. And a \$69 billion short position being**  
14 **assumed by Barclays; that's the short position**  
15 **against the long position, yes?**  
16 A. Correct.  
17 **Q. And a potential \$750 million upside**  
18 **sharing pursuant to paragraph 3.3, correct?**  
19 A. Correct.  
20 **Q. And if you look at it from that**  
21 **perspective, if you take the real estate and put**  
22 **it to the side, you get into balance, don't you?**  
23 A. No.  
24 **Q. You said roughly \$70 billion?**  
25 A. Well, you left out the other

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 liabilities that were being assumed by Barclays.  
3 **Q. I wanted to go to where the other**  
4 **liabilities assumed by Barclays go. The**  
5 **schedule is they are -- you tell me they're**  
6 **guidance. How do the other liabilities, the**  
7 **comp and the cure liabilities, fit into that,**  
8 **that undertaking?**  
9 Does that mean that Barclays is in the  
10 hole when this is done? Barclays should be --  
11 if short position and long position roughly  
12 match, and cash plus the upside makes it an  
13 exact match, that 70 to 70, doesn't that mean  
14 this is structured so Barclays has a net loss on  
15 the deal, not a gain?  
16 MR. STERN: Objection to the form.  
17 A. I wasn't really thinking of it as loss  
18 or gain. I was thinking of it that they were  
19 assuming certain liabilities to keep the  
20 business intact, and those liabilities were  
21 liability to employees and liabilities in the  
22 ordinary course of operations is the way of  
23 explaining --  
24 **Q. So when you add --**  
25 MR. STERN: Let him finish.

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 A. -- payables and things like that.  
3 **Q. So when you add those comp and cure**  
4 **assumed liabilities on top of the elements I**  
5 **just gave you, there's certainly no gain on**  
6 **acquisition for Barclays, if those numbers are**  
7 **real?**  
8 MR. STERN: Objection to the form.  
9 A. Well, again, no one was actually --  
10 I'm repeating my answer a little bit. No one  
11 was saying this schedule, Exhibit 19, is the  
12 deal and see how all these numbers add up. The  
13 deal was the Asset Purchase Agreement. This was  
14 meant as some guidance for that as what we meant  
15 as 70 billion of assets. For instance, 70  
16 billion of assets could have been 69 billion of  
17 governments --  
18 **Q. Okay.**  
19 A. -- and 1 billion of other stuff, or it  
20 could have been 69 billion of corporate equity  
21 and 1 billion of governments, right? So we  
22 needed to -- because we didn't specify any of  
23 that in the text. It was just 70 billion of all  
24 this stuff. And this gives you a little bit  
25 better sense of what that stuff is.

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 positions that moved over because it made sense  
3 for them to move over with the employees that  
4 were moving over instead of all those positions  
5 being left behind with a bankrupt estate with  
6 nobody to manage them at the time. And what  
7 they were doing was paying some amount for  
8 value, but also assuming certain liabilities  
9 which at the time, in the course of a, you know,  
10 a day or so, day and a half, were difficult to  
11 estimate what they would be.  
12 There was a sense that there was an  
13 idea of what compensation would be and there  
14 might have been some guesses at what it would  
15 mean to take on accounts payable, but remember,  
16 a lot of this depended on what contracts were  
17 going to be assumed and, again, that was all a  
18 post-signing, post-closing determination.  
19 So the deal was assumption of this  
20 list of liabilities, and I don't think anyone  
21 thought at the time that we could be precise of  
22 what the value of those liabilities would be.

23 MR. STERN: And you're referring to  
24 the --

25 MR. GAFFEY: Agreement.

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Q. I'm sorry.**  
3 A. I'm sorry, "this" being Exhibit 19.  
4 **Q. Right.**  
5 A. Because that 70 billion could have  
6 been in any kind of allocation among those  
7 different kind of asset classes.  
8 So the schedule had value in that  
9 sense and was worth putting together and worth  
10 memorializing as a final one because it helped  
11 provide guidance on that that when Lehman  
12 transferred assets to Barclays -- again, this is  
13 all superseded by what happened, but Barclays  
14 didn't say, guess what? I just got 70 billion  
15 of corporate equities which are going down 5  
16 percent a day because of what's going on in the  
17 market.  
18 So it was meant the bucket of assets  
19 that were going over were estimated at around  
20 this level. So the schedule has a role to play,  
21 but it's not the deal.

22 **Q. Okay.**

23 A. And the deal is, yeah, you know,  
24 assets, liabilities. No one was thinking of it  
25 as embedded gain or loss, right? They're

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 MR. STERN: -- Asset Purchase  
3 Agreement, Exhibit 1? In your last answer  
4 you were pointing to the agreement?  
5 THE WITNESS: I was pointing to the  
6 Asset Purchase Agreement, yes.  
7 **Q. That actually is the point I wanted to**  
8 **follow up on.**  
9 A. I speak with my hands.  
10 **Q. So do I. That's why we're not**  
11 **videod.**

12 Now, to a person on the 17th of  
13 September looking at the agreement, without  
14 having access to the schedules, that's what I  
15 want to ask you about, the agreement -- go back  
16 to the numbers I went through before. The  
17 agreement shows a rough balance in the numbers  
18 shown of a \$70 billion long position being  
19 transferred to Barclays and a 69 billion -- and  
20 on the other side, a \$69 billion short position  
21 being undertaken, a \$250 million cash payment  
22 being made, and a potential \$750 million upside  
23 sharing with Lehman, which brings you to 70.

24 So someone looking at the agreement  
25 without access to the schedule would see this as

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **an agreement roughly in balance; is that right?**  
3 MR. STERN: Objection to the form.  
4 A. I think that if someone could  
5 certainly shorthand it and sound-byte it. But  
6 if someone was looking at what the agreement  
7 was, you would have to say, okay, purchased  
8 assets; how much cash was going over.  
9 **Q. Uh-huh.**  
10 A. What were the value of the 50 percent  
11 of the residential mortgages that were going,  
12 which go beyond the 70 billion. On the other  
13 hand, there's 69 of short positions, but what is  
14 the actual compensation obligation that's being  
15 undertaken and what do we think is the  
16 obligation on the assumed contracts.  
17 **Q. And nobody looking at that agreement,**  
18 **at least from the point of view of the man who**  
19 **signed it, would read that to say there was a**  
20 **discount being given to Barclays for what it was**  
21 **buying?**  
22 MR. STERN: Objection to the form.  
23 A. I didn't believe at the time when I  
24 signed this agreement that the intent of the  
25 agreement was to deliver assets with a material  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 here are -- and it goes both ways, right? Here  
3 are a bunch of government securities that we can  
4 know with precision are worth 40 billion and  
5 they're going to be worth 40 billion tomorrow  
6 when everybody was taking their money and  
7 putting it into treasuries, and here's a bunch  
8 of corporate equity that we can say with  
9 certainty is worth 8.8 and it's going to be  
10 worth anything with certainty at 8.8 tomorrow or  
11 the next day or the day after that is not a  
12 reasonable assessment of the situation at the  
13 time.  
14 You know, there was an estimate that  
15 was made of a book of assets and a book of  
16 liabilities that would go over, but the deal  
17 itself was not intended to, as to my knowledge,  
18 deliberately create any sort of embedded  
19 bankable gain on the part of Barclays.  
20 **Q. While we're digging out, let me ask**  
21 **you: You made a reference to this before and**  
22 **I'm sort of telling you where a substantial part**  
23 **of the rest of your deposition is going to go,**  
24 **but this deal changed a lot over the next week,**  
25 **didn't it?**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 embedded gain to them, to Barclays.  
3 **Q. And you didn't believe -- let me ask**  
4 **you: Did you believe that this agreement was**  
5 **designed to transfer to Barclays assets for less**  
6 **than their fair value?**  
7 MR. STERN: Objection to the form.  
8 A. I could repeat the answer from the  
9 last one, but to try to give you another answer,  
10 I think that one of the considerations was that  
11 fair market value at the time, right? Day or  
12 two after Lehman bankruptcy was very difficult  
13 thing to determine, and what things might have  
14 been on our books and records going into the  
15 weekend before a Lehman bankruptcy and the risk  
16 of, not to sound too dramatic, of financial  
17 Armageddon is different than what the value of  
18 those assets might be.  
19 I think you have to keep in mind that  
20 this transaction was done in not only the chaos  
21 of an unprecedented bankruptcy of Lehman  
22 Brothers, but also a chaos in the markets that  
23 is -- I would say it was somewhat unprecedented,  
24 too, and which lasted for quite a while.  
25 And therefore, you know, to say that  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Yes, it did.  
3 **Q. Just give me the overall. How did it**  
4 **change over the next week between the deal that**  
5 **you signed and the deal that you closed?**  
6 A. To my understanding, in no particular  
7 order of importance. Cash was not being  
8 transferred over. The residential mortgages  
9 were not being transferred over, I believe, and  
10 we used to deal with other issues that Lehman  
11 had to address on the trading side, on the  
12 settlement side, and that the pool of assets and  
13 liabilities that were being transferred over  
14 changed dramatically so that more assets and  
15 liabilities were being retained by the estate.  
16 **Q. Any others? Just, again, at the sort**  
17 **of global level, any big categories of changes?**  
18 A. As we go through it, other things may  
19 come to mind, but right now I'm not recalling  
20 anything.  
21 (Exhibit 22, Barclays PLC Results  
22 Announcement, Figures 2008, marked for  
23 identification, as of this date.)  
24 **Q. Just if you'll go back briefly to a**  
25 **topic we were discussing a moment ago. I put**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 before you what we have marked as Exhibit 22, a  
3 copy of Barclays PLC Results Announcement,  
4 Figures 2008, and I'd ask you, sir, to turn to  
5 page 95 of that document, which describes the  
6 acquisition of Lehman Brothers North American  
7 businesses?

8 A. Yes.

9 Q. Okay. And the second paragraph from  
10 the bottom that says, "The excess of the fair  
11 value of net assets acquired over consideration  
12 paid resulted in 2,262,000 pound of gains on the  
13 acquisition," do you see that?

14 A. Yes.

15 Q. And if I understand your testimony  
16 from this morning correctly, the deal that you  
17 agreed to on the 16th did not -- was not  
18 intended to have that sort of embedded gain on  
19 acquisition?

20 MR. STERN: Objection to the form.

21 Q. Is that right?

22 MR. STERN: Objection to the form.

23 A. I've never seen this document before.

24 Q. Okay.

25 A. I've never seen this section of the

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 document. I have no idea whatsoever what this  
3 "excess of fair market value net assets" means  
4 and how it was calculated, so let me preface my  
5 answer with that.

6 Q. Sure.

7 A. So I can't speak to this at all.

8 But I would reiterate that it was not  
9 the intention at the time of signing of the  
10 Asset Purchase Agreement that the transaction  
11 included as an element of it that there were --  
12 there was certainty of any kind of embedded gain  
13 in assets that were being transferred over --  
14 and assets, in this case, I mean specifically  
15 security positions as opposed to intangibles,  
16 franchise value -- that there was any kind of  
17 embedded gain in the tangible assets that were  
18 being transferred over to Barclays.

19 Q. Okay. Thanks. I'm done with that  
20 document.

21 Was it contemplated that during the  
22 week of the 16th that there would be an  
23 opportunity for Barclays to be involved in the  
24 marking of Lehman positions, that is, before the  
25 closing?

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. Could you repeat the question?  
3 Q. Was it contemplated during the week of  
4 the 15th -- withdrawn. Was it contemplated that  
5 after the Asset Purchase Agreement was signed  
6 but before it closed, between signing and  
7 closing, that there would be any role played by  
8 Barclays in the marking or remarking of Lehman  
9 positions on its books?

10 A. I don't know.

11 Q. Have you ever heard a suggestion that  
12 that was contemplated or that it took place?

13 A. I don't know of any remarking of the  
14 Lehman book by Barclays.

15 Q. Do you know of any remarking of the  
16 Lehman book at all after -- between the signing  
17 but before the closing?

18 A. I believe we still had an obligation  
19 to continue to mark our book as we had, you  
20 know, in the ordinary course under very  
21 extraordinary circumstances. I don't know what  
22 we were able to do during that period of time.

23 Q. Right.

24 A. And so I don't know what actually was  
25 undertaken by our -- the people responsible, the

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 Finance staff and Operations staff, of that. I  
3 don't know.

4 (Exhibit 23, a document bearing Bates  
5 Nos. 70283, marked for identification, as of  
6 this date.)

7 Q. I have put before you, Mr. Berkenfeld,  
8 what we have marked as Exhibit 23, a one-page  
9 document bearing Bates numbers 70283, an e-mail  
10 chain between Ian Lowitt and Gerard Reilly.

11 Let me know when you've had a chance  
12 to take a look through that document?

13 A. Uh-huh.

14 (Document review.)

15 A. Okay.

16 Q. Okay. Have you ever seen this e-mail  
17 chain before?

18 A. I have not.

19 Q. Do you have any clue what Mr. Lowitt  
20 would be talking about to Mr. Reilly when he  
21 says at the bottom of it, "Are we set up to do  
22 the marking of positions?" and then clarifies  
23 saying, "What I meant was for BarCap to mark the  
24 positions further"?

25 A. I have no knowledge of what Ian

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 intended.

3 **Q. Given your role in signing the**  
4 **agreement and your involvement in the**  
5 **transaction, would it have surprised you to**  
6 **discover a role for Barclays in determining what**  
7 **the Lehman mark should be?**

8 MR. STERN: Objection to the form.

9 A. It would not have surprised me to know  
10 that, after the signing of the agreement,  
11 Barclays would continue to do due diligence on  
12 the assets and liabilities that it was assuming.

13 **Q. You would -- well, okay, fair comment.**  
14 **But are you reading the phrase "BarCap to mark**  
15 **the positions further" to be a reference,**  
16 **possibly a reference to due diligence?**

17 I know you're speculating.

18 MR. STERN: Objection to the form.

19 A. I am speculating. I don't know what  
20 was intended by Ian, but I, if I had to  
21 interpret this, I would say that Barclays didn't  
22 have a lot of time to do due diligence before  
23 the signing of the purchase agreement, they  
24 didn't have much time to do due diligence even  
25 before the bankruptcy when we were involved in

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 original discussions, and that they would have  
3 wanted to have their team of guys taking a  
4 closer look at what was being transferred over  
5 in those positions before they got to the  
6 closing date and things were at that point  
7 irreversible.

8 **Q. Now, if you could take look at the**  
9 **e-mail conversation that's taking place between**  
10 **Mr. Lowitt and Mr. Reilly at the top of the**  
11 **page, and here I am at from Reilly to Lowitt,**  
12 **September 17, 2008, 9:41 P.M. You see where I**  
13 **am on the page?**

14 A. Yes.

15 **Q. Okay. And this is what Mr. Reilly**  
16 **wrote: "I went through all docs and did not see**  
17 **reference to the price haircut. If we want**  
18 **conservative marks to reflect block nature, we**  
19 **need to know how much and then can allocate to**  
20 **most logical assets."**

21 **Do you understand that to be -- and**  
22 **then so, for completeness, then Mr. Lowitt**  
23 **responds: "Since not in contract, hard to see**  
24 **what to" -- it says "DP," but I'm reading that**  
25 **as "do," period, "Ian."**

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Do you understand this to be a**  
3 **communication between Mr. Reilly and Mr. Lowitt**  
4 **about a haircut or a block discount on the**  
5 **assets being transferred to Barclays?**

6 MR. STERN: Objection to the form.

7 A. I again don't know what was in Ian's  
8 or Jerry's mind and what they were talking  
9 about.

10 **Q. Sure.**

11 A. I do focus on the "since not in  
12 contract" part of this, but I don't know what  
13 they meant. And again, it's speculation.  
14 There's a lot of assets going over. They were  
15 never marked on the Lehman books as though you  
16 were going to transfer all of those assets in  
17 bulk. They were marked position by position in  
18 a very volatile time.

19 So they -- there was always a question  
20 in hindsight about the accuracy of those marks  
21 given what happened subsequently. But when you  
22 mark a position like 8.78 in corporate equity --

23 **Q. Referring to Exhibit 19?**

24 A. Referring to Exhibit 19, 8.8 in  
25 corporate equity or 4.5 in derivatives, and you

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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 were interested in the fair market value, if you  
3 were trying to find a buyer as a marked position  
4 for someone who would buy the whole 8.8 billion  
5 of corporate equities, which was stock-by-stock,  
6 company-by-company, but you want someone to buy  
7 the whole bulk of it, there would be some sort  
8 of discount for the illiquidity and bulk nature  
9 of that.

10 **Q. And you would expect that concept to**  
11 **be reflected in the agreement that was signed,**  
12 **would you not?**

13 MR. STERN: Objection.

14 **Q. If that was part of the deal?**

15 MR. STERN: Object to the form.

16 **Q. As you said, you took note of the**  
17 **phrase "not in contract"?**

18 A. Again, I go back to what I had said  
19 before, that the schedule and the values was not  
20 the agreement. The agreement was, here's this  
21 pool of assets, here's this pool of liabilities  
22 that are going to go over, this gives some  
23 guidance as to it, but the deal was not  
24 contemplating an embedded gain.

25 **Q. I'll phrase the question roughly the**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 same way, but with a different premise. If you  
3 could just forget the schedules for a minute.

4 From the perspective of what was filed  
5 with the bankruptcy court, which was the  
6 agreement, there's no reflection of the type of  
7 block discount that you're talking about now?

8 MR. STERN: Objection to the form.

9 **Q. Correct?**

10 A. I'm not aware of anything in the  
11 contract or anything that was presented to the  
12 bankruptcy court that should be characterized  
13 accurately as the block discount.

14 **Q. Okay.**

15 MR. GAFFEY: Let's go off the record  
16 for a second.

17 (Luncheon Recess; Time Noted: 12:22  
18 P.M.)  
19  
20  
21  
22  
23  
24  
25

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 AFTERNOON SESSION

3 (Time Noted: 1:03 P.M.)

4 STEVEN BERKENFELD, resumed and  
5 testified further as follows:

6 EXAMINATION BY (Cont'd.)

7 MR. GAFFEY:

8 **Q. Before the break, Mr. Berkenfeld, we**  
9 **were -- I sort of introduced a topic of changes**  
10 **in the deal that occurred between signing and**  
11 **closing, and I was trying to get a sort of**  
12 **overall sense of what factors caused those**  
13 **changes.**

14 (Exhibit 24, First Amendment to the  
15 Asset Purchase Agreement, marked for  
16 identification, as of this date.)

17 (Exhibit 25, a letter dated September  
18 20, 2008, marked for identification, as of  
19 this date.)

20 **Q. I've put two documents before you, Mr.**  
21 **Berkenfeld. When you've had a chance to look**  
22 **through them both, let me know and then I'll**  
23 **describe them for the record and ask you some**  
24 **questions about them.**

25 A. Okay.

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 **Q. We've marked as Exhibit 24, sir, a**  
3 **document entitled First Amendment to Asset**  
4 **Purchase Agreement, and it's a three-page --**  
5 **it's a four-page document.**

6 Do you recognize the document?

7 A. Yes.

8 **Q. And on the third page, is that your**  
9 **signature under the heading "Lehman Brothers**  
10 **Holdings" and under "Lehman Brothers, Inc."?**

11 A. Yes.

12 **Q. And the second exhibit we have marked**  
13 **is in letter form, typed across, center,**  
14 **"Barclays Capital Inc.," dated as of September**  
15 **20, 2008, and on six pages from the back,**  
16 **there's a signature page for Lehman Brothers**  
17 **Holdings; is that your signature there?**

18 A. Yes.

19 **Q. Okay. Could you tell me what the two**  
20 **documents are by reference to their exhibit**  
21 **numbers?**

22 A. Exhibit 24 is an amendment to an Asset  
23 Purchase Agreement, the Asset Purchase Agreement  
24 that had been signed a few days earlier, and  
25 Exhibit 25 is another agreement that amends the

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**

2 purchase agreement in the First Amendment.

3 **Q. For clarity on the record, can I ask**  
4 **you, the second document, the one marked as**  
5 **Exhibit 25, that was referred to, as it was**  
6 **being developed and until it was signed, as the**  
7 **clarification letter; is that right?**

8 A. I don't recall.

9 **Q. Okay. Can we agree that, at least for**  
10 **purposes of this record, if I refer to the**  
11 **document as the clarification letter, I will be**  
12 **referring to Exhibit 25?**

13 A. That's fine.

14 **Q. Okay. So it's a tumultuous week and**  
15 **things are changing and people are running**  
16 **around the 32nd floor and elsewhere and the deal**  
17 **is getting amended and then amended further and**  
18 **the clarification letter.**

19 Are there any particular events during  
20 that week, and again, I'm sort of at a top level  
21 on this, but any events during that week that  
22 required the deal to be changed?

23 A. I do recall that we had issues with  
24 DTC and our ability to settle that required and  
25 were the reason for the First Amendment. I

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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       remember very little of the specific details and  
3       back and forth, but there certainly was DTC  
4       coming in as an interested party that forced the  
5       renegotiation of the transaction.  
6       **Q. Is it fair to say that, in essence,**  
7       **the DTC issue was that DTC had some resistance**  
8       **or some reluctance to effect account transfers**  
9       **over to Barclays without DTC getting some kind**  
10      **of protection?**  
11      A. I would say that DTC was concerned  
12      about its responsibility if the securities  
13      didn't transfer or a settlement didn't occur. I  
14      don't remember much of what was their objective.  
15      **Q. And another event, as I understand it,**  
16      **that occurred during that week is that the**  
17      **Federal Reserve which had been supplying Lehman**  
18      **with financing through a Repurchase Agreement**  
19      **made it known that it wanted Barclays to step**  
20      **into the shoes of the Fed repo, is that -- does**  
21      **that ring a bell? Do you have any recollection**  
22      **of that?**  
23      A. Vague recollection. I really wasn't a  
24      part of those discussions.  
25      **Q. Do you have a recollection of, just as**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       that paragraph addresses the purchased assets  
3       and changes, the purchased assets provisions of  
4       the September 16th Asset Purchase Agreement.  
5       **Do you have any recollection of that**  
6       **being, again, globally, that being an issue that**  
7       **had to be addressed?**  
8       A. I have recollection of an issue that  
9       had to be addressed, yes.  
10      **Q. And in paragraph 1(a)(ii), you'll see**  
11      **it says as follows: "With respect to clauses**  
12      **(a), (d) and (e) of the definition of 'Purchased**  
13      **Assets' in the Original Agreement, instead of**  
14      **the items referred to in such clauses, (A) the**  
15      **securities owned by LBI and transferred to**  
16      **purchaser or to its affiliate under the Barclays**  
17      **Repurchase Agreement (as defined below) as**  
18      **specified on Schedule A previously delivered by**  
19      **Seller and accepted by Purchaser" -- let me just**  
20      **stop there.**  
21      **Does the reference to the Barclays**  
22      **Repurchase Agreement in that new definition of**  
23      **"purchased assets" refresh your recollection as**  
24      **to whether the Barclays repo played any role or**  
25      **had any implications with respect to the Asset**  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       an event as opposed to its implications, Lehman  
3       and Barclays entering into a certain Repurchase  
4       Agreement on or around September 18 of that  
5       week?  
6       A. Don't recall that.  
7       **Q. Do you have any recollection of a**  
8       **Repurchase Agreement between Barclays and Lehman**  
9       **playing any role or having any implications with**  
10      **respect to the structure of the transaction?**  
11      A. I don't recall the specifics around  
12      the repo agreement or the financing with  
13      Barclays. I wasn't involved in the discussions  
14      around it or the crafting of it.  
15      **Q. Okay.**  
16      A. And didn't know going into the end of  
17      the week the implications it would have for the  
18      purchase agreement.  
19      **Q. Okay. We'll come back to that in a**  
20      **little more detail, but if you would take a look**  
21      **at the clarification letter, that is, Exhibit**  
22      **25, and in particular, if you would look at**  
23      **paragraph 1 entitled "Purchased Assets; Excluded**  
24      **Assets," all right?**  
25      And generally, sir, you'll see that  
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1       **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2       Purchase Agreement?  
3       A. I don't recall the financing  
4       arrangement in the repo.  
5       **Q. Uh-huh.**  
6       A. I certainly have seen the  
7       clarification agreement before --  
8       **Q. Sure.**  
9       A. -- and knew that that was the  
10      amendment substituting for the purchased asset  
11      provisions of the Asset Purchase Agreement. So  
12      I'm not sure what you're asking me.  
13      **Q. I guess -- let me put it another way.**  
14      **Do you know why that amendment was needed?**  
15      A. No.  
16      **Q. Okay. Let me back up a little bit.**  
17      **Describe for me what your role was at the time**  
18      **in connection with the negotiation and drafting**  
19      **and conclusion of the clarification letter.**  
20      A. Very minimal from the time of the  
21      signing of the Asset Purchase Agreement. I was  
22      more involved in a bunch of other things. There  
23      were a whole bunch of other assets that weren't  
24      transferring. There were employee issues,  
25      counterparty issues.  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 So my area of expertise was not repo  
3 financing and I was not involved in how the  
4 financing of the positions would occur and the  
5 transfer of it from the Fed to Barclays and what  
6 would be in that pool.  
7 **Q. Right.**  
8 A. So I had very little involvement with  
9 this agreement I would say until the weekend,  
10 the following weekend when the deal was being  
11 put in a position for closing after the hearing  
12 on the 19th.  
13 **Q. Okay. I'll show you during the day,**  
14 **and I won't take time with it now, but I'm going**  
15 **to show you during the day, during today, some**  
16 **drafts of the clarification letter that crossed**  
17 **your screen, that did come across on e-mail.**  
18 **That's why I asked that question. I want to get**  
19 **a sense of whether you're involved in it or**  
20 **scanning it, if you see the differentiation I'm**  
21 **making.**  
22 A. It may even be a different description  
23 than that.  
24 **Q. What would it --**  
25 A. It may even less than a scan.  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Q. From?**  
3 A. From more involvement from Lehman  
4 employees.  
5 **Q. Okay. Now, do you have a, as the**  
6 **signatory to both agreements -- and by that I**  
7 **mean the Asset Purchase Agreement dated**  
8 **September 16 on the one hand and the**  
9 **clarification letter dated as of September 20 --**  
10 **do you have a sense of whether there were big**  
11 **changes, material changes, significant changes**  
12 **from one to the other?**  
13 MR. STERN: Objection to the form.  
14 A. I have a sense of some of the changes  
15 that were made. I think you could characterize  
16 them in a few different ways, but they were not  
17 immaterial.  
18 **Q. Not to quibble, but does "not**  
19 **immaterial" mean material? I just want to get**  
20 **some terms we can use in the questions.**  
21 MR. STERN: Objection to the form.  
22 A. I think it depends on the change.  
23 **Q. What do you remember as being the not**  
24 **immaterial changes that were made from the Asset**  
25 **Purchase Agreement dated September 16th via the**  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **Q. All right. Who did negotiate the**  
3 **business terms of the clarification letter?**  
4 A. Bart was still very much involved. To  
5 the best of my recollection, I believe that Mark  
6 Shapiro and Jim Seery were very much involved.  
7 I don't remember who else, though.  
8 **Q. Do you remember there may have been**  
9 **others, but you remember --**  
10 A. I should, by the way, very much so add  
11 Weil Gotshal.  
12 **Q. That's in the negotiation of the**  
13 **business terms or the drafting of the business**  
14 **terms that are agreed? That's the distinction**  
15 **we talked about this morning with respect to the**  
16 **APA.**  
17 A. I would say on the negotiation of the  
18 business terms.  
19 **Q. Who at Weil Gotshal?**  
20 A. Tom Roberts in particular. Harvey  
21 Miller. There was a shifting as Lehman went  
22 into bankruptcy over who took responsibility for  
23 negotiation of business terms.  
24 **Q. Well, a shifting from whom to whom?**  
25 A. A shifting to Weil Gotshal attorneys.  
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1 HIGHLY CONFIDENTIAL - S. BERKENFELD  
2 **clarification letter dated as of September 20?**  
3 A. Primarily the transfer of assets and  
4 assumptions of liabilities.  
5 **Q. How did that change?**  
6 A. It changed in size and amount.  
7 **Q. And give me your best recollection of**  
8 **the quantification of the difference in size and**  
9 **amount.**  
10 A. My best recollection is from the 72  
11 billion or so, 70 billion of assets -- excuse  
12 me, 70 billion to more in the neighborhood of 42  
13 billion or so.  
14 **Q. And what caused the change, the change**  
15 **in value from roughly 70 billion to something**  
16 **around 42 billion?**  
17 A. I don't know.  
18 **Q. No clue?**  
19 A. "No clue" would be a good enough  
20 answer. I wouldn't have used it myself, but no  
21 clue.  
22 **Q. That's why they invented leading**  
23 **questions.**  
24 **Was it because of a drop in value of**  
25 **the body of collateral or a diminution in the**  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 collection of collateral -- of assets that was  
3 being done?  
4 A. I don't know.  
5 Q. You don't know, okay.  
6 How did you learn about the change in  
7 value?  
8 A. I was -- I don't recall how I first  
9 learned. I know it was part of the hearing in  
10 front of, you know, in front of bankruptcy  
11 court.  
12 Q. We both know apparently that that  
13 change was told to the judge on Friday at the  
14 sale hearing. Is that what you're referring to?  
15 A. Yes. I don't have any recollection --  
16 Q. Uh-huh.  
17 A. -- of knowing about that before the  
18 hearing.  
19 Q. Okay. That's anticipating my next  
20 question. I wanted to get -- we have Tuesday,  
21 Wednesday, Thursday, right? The 16th, the 17th  
22 and 18th.  
23 As your best recollection, if I  
24 understand your answer correctly, your best  
25 recollection is that you learned of the  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 You neither asked nor do you recall  
3 overhearing somebody talk about it?  
4 MR. STERN: Objection to the form.  
5 A. I don't recall asking or being given  
6 any information or overhearing a discussion  
7 about it.  
8 Q. By the time that you signed -- when  
9 did you actually sign the clarification letter?  
10 It's dated as of the 20th.  
11 A. What day was the 20th?  
12 MR. STERN: Objection to the form.  
13 Q. The 20th is a Saturday.  
14 A. Best of my recollection, would have  
15 been at some point on Sunday.  
16 Q. Signed on the Sunday?  
17 I want to be fairly precise with this.  
18 Do you recall if you signed it on a Sunday or if  
19 you signed it at the closing on the Monday?  
20 A. I don't recall.  
21 Q. Do you recall if the clarification  
22 letter was complete, was put in final by the  
23 Sunday?  
24 A. I don't recall.  
25 Q. By the time that you signed it,  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 diminution in value when it was told to the  
3 court on Friday?  
4 A. I don't recall knowing about it before  
5 then.  
6 Q. Okay. Were you in court on the  
7 Friday?  
8 A. Yes.  
9 Q. All day and night?  
10 A. From the start till the concluding  
11 statement by Judge Peck, yes.  
12 Q. Okay. So you were there for the  
13 applause at the end at 20 after midnight?  
14 A. It's probably beyond what I have to  
15 say, but yes, I was perhaps someone that might  
16 have been applauding.  
17 Q. When you learned about the drop in the  
18 number from 70 to about 42, did you follow up?  
19 Did you ask anyone what accounted for that  
20 change?  
21 A. I don't recall any conversations on  
22 it.  
23 Q. So my question was did you ask anyone.  
24 Your answer was you don't recall any  
25 conversations. Let me just close that circle.  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 whether it be the Sunday or the Monday, did you  
3 have an understanding, by whatever means, the  
4 reason for the difference in the value -- the  
5 difference from 70 to about 42?  
6 A. No.  
7 Q. And by the time that you signed it --  
8 at the time that you signed it, did you have an  
9 understanding as to why the definition of  
10 "purchased assets" was changed to, among other  
11 things, make to include the "securities owned by  
12 LBI and transferred to purchaser or its  
13 affiliates under the Barclays Repurchase  
14 Agreement"?  
15 A. No.  
16 Q. Did it come to your attention at any  
17 point in the week between signing on the Tuesday  
18 and closing on the Monday that Barclays had  
19 issued a Notice of Termination regarding the  
20 Repurchase Agreement?  
21 A. No, I don't think so.  
22 Q. Did the fact that Barclays had  
23 terminated the Repurchase Agreement on Friday  
24 the 19th hit your screen, come to your attention  
25 in the course of the clarification letter being  
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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 finalized and your signing it?  
3 A. No, I don't think so. I don't recall  
4 it.  
5 **Q. Do you recall that being a topic of**  
6 **discussion at all?**  
7 A. I recall the financing being a topic  
8 of conversation over that weekend.  
9 **Q. Okay. My question is a little more**  
10 **specific and I want to make sure we're**  
11 **understanding each other.**  
12 **Do you recall the topic of the**  
13 **termination of the repo by Barclays coming up in**  
14 **connection with the clarification letter?**  
15 A. I don't recall.  
16 **Q. At any time, be it that week or any**  
17 **other time, have you formed an understanding as**  
18 **to the implications of a terminated repo with**  
19 **regard to a company that has already filed**  
20 **bankruptcy?**  
21 MR. STERN: Objection to the form.  
22 A. No.  
23 **Q. That's a -- we should actually take**  
24 **that question out and shoot it. Let me try**  
25 **another one.**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Was the termination of the repo an**  
3 **issue that needed to be addressed in the**  
4 **structure or the form or the content of the**  
5 **clarification letter?**  
6 A. I don't know.  
7 **Q. You don't know, okay.**  
8 **By the time that you signed the**  
9 **agreement on, whether it be the Sunday night or**  
10 **the Monday, you had an understanding of the**  
11 **terms of the clarification agreement that you**  
12 **signed, correct?**  
13 A. Yes.  
14 **Q. And did you have an understanding of**  
15 **the reason for each of the terms of the**  
16 **clarification letter?**  
17 A. No.  
18 **Q. Did you ask?**  
19 A. I didn't ask the reason for the terms.  
20 I had conversations with Bart McDade and with  
21 Weil Gotshal --  
22 **Q. Okay.**  
23 A. -- that it reflected the business deal  
24 as amended.  
25 **Q. Okay. That --**

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 A. The clarification agreement broadly  
3 and didn't -- I don't recall any conversation  
4 around the repo or financing provisions in  
5 particular.  
6 **Q. As to its terms in whole, in**  
7 **general -- let me give you a spectrum. We'll**  
8 **sort of set the stages for the questions that**  
9 **follow.**  
10 **Somewhere between "sign this, we need**  
11 **this," with no explanation, and a session where**  
12 **you go through each and every provision and**  
13 **somebody tells you "this is what it means and**  
14 **this is why we did it," give it to me on that**  
15 **scale of how much explanation you got of the**  
16 **terms of the clarification letter before you**  
17 **signed it.**  
18 A. I think it depends on the provision,  
19 but it was more along the side of the spectrum  
20 of this is the new business deal that's been  
21 agreed to.  
22 **Q. Was there a new deal that was agreed**  
23 **to by the time the clarification letter was**  
24 **signed?**  
25 A. What do you mean by "new deal"?

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1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**  
2 **Q. Well, would it be fair to describe the**  
3 **deal reflected in the clarification letter that**  
4 **you signed as a new deal, as a different deal**  
5 **than the one that you signed on the 16th?**  
6 MR. STERN: Objection to the form.  
7 Are you asking new or different?  
8 MR. GAFFEY: I'll take different.  
9 A. I would characterize it as an amended  
10 deal.  
11 **Q. Significant amendment? Minor**  
12 **amendment?**  
13 A. Significant in some respects. Minor  
14 in others.  
15 **Q. I promise I'm going to show you the**  
16 **letter in a minute just as soon as I find my**  
17 **marked up one, but any independent recollection**  
18 **of any significant -- any topics that were the**  
19 **subject of significant amendments?**  
20 A. In the topic of the assets and the  
21 liabilities and the financing, which I had  
22 nothing to do with, "nothing" was a bit of an  
23 overstatement, but hardly anything to do with,  
24 was a significant category. There were a lot of  
25 other things in the agreement that I believe

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